12-18-2008

Schmechel v. Dille Respondent's Brief 2 Dckt. 35050

IN THE SUPREME COURT OF THE STATE OF IDAHO

VAUGHN SCHMECHEL, Individually, and as Surviving Spouse and Personal Representative of the Estate of ROSALIE SCHMECHEL, deceased, and ROBERT P. LEWIS, KIM HOWARD and TAMARA HALL, natural children of ROSALIE SCHMECHEL, deceased,

Plaintiffs–Appellants,

v.

CLINTON DILLÉ, M.D., SOUTHERN IDAHO PAIN INSTITUTE, an Idaho corporation, THOMAS BYRNE, P.A., and JOHN DOE and JANE DOE, I through X,

Defendants–Respondents

Supreme Court
Docket No. 35050

RESPONDENTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls
Honorable G. Richard Bevan Presiding

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I. STATEMENT OF THE CASE.

1. Nature of the Case.

This Appeal arises from a medical malpractice/wrongful death action, Plaintiffs Vaghn Schmechel, Robert Lewis, Kim Howard and Tamara Hall (collectively "Plaintiffs") filed against Defendants Thomas J. Byrne ("Mr. Byrne"), Clinton Dillé, M.D., ("Dr. Dillé") and Southern Idaho Pain and Rehabilitation Institute (collectively, "Defendants"). The Plaintiffs alleged the Defendants were negligent in the dosing of a pain medication, methadone, and in the instructions regarding its use given to the decedent, Rosalie Schmechel ("Mrs. Schmechel"). The case was tried to a Jury from October 16-30, 2007. The Jury unanimously found no Defendant violated the standard of care. Plaintiffs filed a motion for new trial asserting evidentiary and instruction errors. The District Court denied the Plaintiffs' motion.

2. Statement of Facts.

Prior to being seen at Southern Idaho Pain and Rehabilitation Institute ("SIPI"), on September 26, 2003, Mrs. Schmechel had a long history of severe back and leg pain, including multiple surgical interventions, and other health issues. (Tr. Vol. 1, p. 1051, L. 4 – p. 1054, L. 8). Kimberly Vorse, M.D. a sleep and pain medicine physician in Sun Valley, Idaho, had treated Mrs. Schmechel for pain and sleep apnea for years. (Tr. Vol. 1, p. 507, LL. 3-8). Mrs. Schmechel decided she wanted to find a pain management provider closer to her home in Twin Falls. (Tr. Vol. 1, p. 870, LL. 4-17). Thus, she was referred to SIPI for pain management. (Tr. Vol. 2, p. 1252, LL. 14-20).

SIPI is a Twin Falls, Idaho pain management clinic and surgery center dedicated to pain management treatment. (Tr. Vol. 2, p. 1375, L. 14 – p. 1376, L. 9). In 2001, Dr. Dillé hired Mr. Byrne to work as a physician assistant at SIPI. (Tr. Vol. 2, p. 1381, LL. 1-8). Physician assistants examine patients, treat patients, prescribe medications, and treat a number of illnesses. (Tr. Vol. 2, p. 1237, L. 5 – p. 1239, L. 9). Mr. Byrne was licensed by the state of Idaho. While employed at SIPI, Mr. Byrne had extensive experience and expertise prescribing OxyContin, methadone and other pain medications, and had treated numerous patients like Mrs. Schmechel. (Tr. Vol. 2, p. 1387, L. 2 — p. 1390, L. 25).

When she presented to SIPI, Mrs. Schmechel had been taking a long acting opioid, OxyContin, 60 mg a day, and for break through pain, up to six Lortab, 7.5 mg tablets per day. (Tr. Vol. 2, p. 1266, LL. 10-22).

When Mr. Byrne saw Mrs. Schmechel on September 26, 2003, he performed a full physical examination and obtained a complete and detailed medical history. (Tr. Vol. 2, p. 1255, LL. 5-21). Based upon Mrs. Schmechel's evaluation, it became apparent her existing pain management program was unsatisfactory. (Tr. Vol. 2, p. 1286, L. 12— p. 1287, L. 6). In fact, Mrs. Schmechel indicated on her pain questionnaire that her subjective view of her daily pain was a 10 on a 10 point scale. (Tr. Vol. 2, p. 1276, LL. 11-17).

Mrs. Schmechel did not feel the OxyContin was working adequately, nor as effectively as it once had worked. (Tr. Vol. 3, p. 1289, LL. 3-15). Mr. Byrne discussed with Mrs. Schmechel that sometimes, after being on a pain medication for a long time, changing to different opioid medication often helped provide better pain control. (Tr. Vol. 2, p. 1289, LL. 3-15). Because of

its long acting potential to help with neuropathic pain such as she had, Mr. Byrne suggested that they try methadone. (Tr. Vol. 2, p. 1289, LL.16-22). He explained to her that methadone was a long acting opiod that achieved this long acting effect by slowly building up in one's system. (Tr. Vol. 2, pp. 1290, L. 17 – p. 1291, L. 16). Just like OxyContin, methadone is an opioids and is a very commonly used pain medication because of its effectiveness, long acting nature and its low cost. (Tr. Vol. 2, p. 1679, L. 15 — p. 1680, L. 3). Mr. Byrne then explained the inherent risks of methadone, including risks due to its long half life that can cause it to build up and potentially cause respiratory depression and death. (Tr. Vol. 2, p. 1291, L. 17 — p. 1292, L. 14).

Mr. Byrne calculated her conservative starting conversion dose of methadone at 30 mg per day (15 mg twice daily) based upon his extensive experience converting patients from OxyContin to methadone. (Tr. Vol. 2, p. 1294, L. 13 — p. 1295, L. 7). There was no dispute at trial that this was a reasonable starting conversion dose based on her prior daily 60 mg OxyContin dose. To avoid any undue side effects from unexpected sensitivity to the medication, Mr. Byrne instructed her to start by taking 5 mg of methadone two times per day and gradually increase over the next few days to the conversion starting does of 15 mg twice a day. (Tr. Vol. 2, p. 1295, L. 8— p. 1296, L. 10).

Mr. Byrne instructed her to come back and be seen by Dr. Dillé within two weeks. (Tr. Vol. 2, p. 1302, L. 11— p. 1303, L. 1). To see how she was doing, Mr. Byrne called Mrs. Schmechel on Sunday, September 28, 2003. Mrs. Schmechel reported she was doing well, had no adverse side effects, and had some improved pain control though she was still having considerable pain. Mr. Byrne told her during that call she could increase to 10 mg twice a day.

(Tr. Vol. 2, p. 1313, L. 1 — p. 1314, L. 2). As instructed by Mr. Byrne, Mrs. Schmechel called him the next day, September 29, 2003. Again, she stated that her pain control was continuing to improve, and was not having adverse reactions though was still having pain. He instructed her to begin taking from 10 to 15 mg of methadone two times per day; *i.e.* she could take up to the staring conversion dose that had been calculated. She was instructed to follow up as planned and to call with any problems. (Tr. Vol. 2, p. 1320, L. 4 — p. 1321, L. 12).

That same day, Mr. Byrne discussed Mrs. Schmechel's case with Dr. Dillé. He informed him of her history of back pain and sleep apnea, and that he had changed her long acting opiod from OxyContin to methadone to get better pain control. Dr. Dillé approved Mr. Byrne's treatment plan. (Tr. Vol. 2, p. 1322, L. 4 — p. 1323, L. 13).

Mrs. Schmechel died sometime the morning of October 2, 2003. Conflicting testimony was presented whether she died from an overdose of her pain medications or from a fatal cardiac dysrythmia caused by her underlying cardiac conditions found at autopsy. (*Cf.* Tr. Vol. 1, p. 931, L. 6 — p. 965, L. 6; Tr. Vol. 2, p. 1581, L. 17 — p. 1650, L. 17).

II. ISSUES PRESENT ON APPEAL.

1. Whether the District Court abused its discretion in excluding Plaintiffs from offering Dr. Stephen Lordon's testimony concerning the 2003 Delegation of Services Agreement;
2. Whether the District Court abused its discretion in allowing Dr. James Smith to testify regarding his causation opinions;
3. Whether the District Court erred in not admitting the IDAPA Regulations or by not giving a negligence *per se* instruction based upon the IDAPA Regulations; and

4. Whether the District Court erred in bifurcating the issue of recklessness from the issues initially submitted to the Jury.

III. REQUEST FOR ATTORNEY FEES AND COSTS.

Respondents Clinton Dillè, M.D. and Southern Idaho Pain and Rehabilitation Institute request their reasonable costs and attorneys' fees on appeal. Idaho App. R. 40; Idaho App. R. 41; I.C. § 12-121.

IV. ARGUMENT.

1. The Exclusion Of Undisclosed Expert Testimony Regarding The Delegation Of Services Agreement Does Not Require A New Trial.

A. Background Regarding The Non-Disclosure.

The Plaintiffs filed their Complaint on January 5, 2006. (R. Vol. 1, pp. 28-36). On March 26, 2006, the parties entered a stipulation requiring Plaintiffs' expert disclosures 180 days prior to trial. (R. Vol. 1, pp. 69-72). The expert disclosures were to conform with Idaho Rule of Civil Procedure 26(b)(4). (*Id.*). Thereafter, the court adopted the Stipulation in its Scheduling Order. (R. Vol. 1, pp.73-74).

Mr. Byrne was deposed on May 18, 2006. (Supp. R. Vol. 6, pp. 1174-1202). At the deposition, the written employment contract between Mr. Byrne and the Southern Idaho Pain and Rehabilitation Institute ("SIPI") entered in 2001 was produced, along with the applicable job description. (Supp. R. Vol. 6, pp.1203-1204). The Delegation of Services Agreement ("DSA")

from 2004 between Mr. Byrne and Dr. Dillé was also produced. (Supp. R. Vol. 6, pp. 1205-1210).[1]

During the deposition, Plaintiffs' counsel began a question with a prefatory statement suggesting that the 2004 DSA was in effect in 2003, when Mrs. Schmechel was treated. (Supp. R. Vol. 6, p.1182). To clarify the record, Dr. Dillé's counsel pointed out that the DSA was from 2004. In addition, he stated his understanding that prior to 2004, a written understanding of the scope of practice between the supervising physician and the physician's assistant was to be kept at the facility, and a DSA was not required to be filed with the Board of Medicine. (Supp. R. Vol. 6 p. 1182; *Id.* at 1169). He then explained his understanding that prior to 2004, the 2001 job description and contract fulfilled this obligation. (*Id.*).[2] In short, Dr. Dillé's counsel made a

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[1] Prior to the deposition, counsel for Mr. Byrne, Rich Hall, made a request of counsel for Dr. Dillé and SIPI to provide to him any documents responsive to Plaintiffs' Duces Tecum deposition that might be in SIPI's files. The contract, job description, and 2004 DSA were found in SIPI's file and provided at the deposition. No other delegation agreement was located. (Supp. R. Vol. 6, p. 1169).

[2] In fact, beginning in 2004, the Board of Medicine prescribed the specific form DSA and required that form be submitted to the Board of Medicine. (Supp. R. Vol. 6, p. 1169); (*See also* the IDAPA § 22.01.03.021.04 (as amended 3/16/2004) (Appendix. A to Respondents' Brief)) (Providing that the Agreement be filed with the Board of Medicine). The Rules in effect in 2003 required only that the DSA and other documents evidencing the physician assistant's scope of practice, including job description, be kept at the facility and not filed with the Board. IDAPA § 22.01.03.030.04 (2003) (Plaintiff's Trial Ex. 39). Both the 2003 and 2004 versions of the IDAPAs defined the DSA as a "written document mutually agreed upon and signed and dated...by the parties that defines the working relationship" between the supervising physician and the physician's assistant. Both the 2003 and 2004 IDAPAs also indicated the Board of Medicine could consider the written Delegation of Services Agreement and any "job descriptions, policy statements, or other documents that define the responsibilities of the physician assistant...." *Compare* IDAPA § 22.01.03.010.06 (2003) (Plaintiffs' Trial Ex. 39) with IDAPA § 22.01.03.101.04 (2004) (Appendix A to Respondents' Brief).

good-faith statement of his understanding and belief at that time regarding applicable Idaho law. (Supp. R. Vol. 6, at 1169-70). Further, it was consistent with the fact that no DSA prior to 2004 was located in SIPI's files. (*Id.*).

Later, Plaintiffs' counsel marked the IDAPAs that post dated 2003 as Exhibit 3 to Mr. Byrne's deposition. (Supp. R. Vol. 6, p. 1198). An objection was asserted that the IDAPAs Plaintiffs' counsel used for questioning post dated 2003. (*Id.*). Nonetheless, Plaintiffs' counsel continued to question Mr. Byrne regarding his obligations under the IDAPAs, and his scope of practice. (*Id.* at 1198-99).

Over the next 15 months, Plaintiffs filed their expert disclosures, depositions of all disclosed Plaintiffs' experts were taken, and multiple supplemental expert opinion disclosures were lodged by the Plaintiffs. Yet, Plaintiffs never disclosed that any of their experts would offer opinions of a breach of the DSA, the job description, the IDAPAs regarding Mr. Byrne's scope of practice, or his legal authority in treating Mrs. Schmechel. (R. Vol. 3, pp. 508-510; Tr. Vol. 1 p. 342, L. 7 to p. 344, L. 14). Further, Plaintiffs did not provide the job description, the 2004 DSA, or any IDAPAs to their experts until October 5, 2007. (Supp. R. Vol. 1, pp. 23-43; R. Vol. 2, pp. 238-242).

Only when Plaintiffs' counsel began preparing for trial in early October did he review the applicable 2003 IDAPAs. It was then that he concluded that a signed DSA was required in 2003. (Tr. Vol. 1, p. 398, LL. 10-16). Based on this determination, he wrote Defendants' counsel indicating his view that a signed DSA was required in 2003, and requesting Defendants' counsel to "supplement your response." (Supp. R. Vol. 5, p. 944) (Tr. Vol. 1, p. 398, LL. 17-24). In

response, Counsel for Mr. Byrne asked Mr. Byrne to search his own records again to see if a 2003 DSA existed, apart from the job description previously produced. (Supp. R. Vol. 6, p. 1098). Mr. Byrne conducted a search of his storage facility and discovered a 2003 DSA. He immediately provided it to his counsel, who in turn immediately produced it on October 10, 2007. (Supp. R. Vol. 5, pp. 949-951).

After receiving the 2003 DSA, the Plaintiffs did not supplement their expert disclosures to include opinions regarding the DSA or related subject matter. The first time the Plaintiffs indicated that they might present expert testimony regarding the DSA or the scope of Mr. Byrne's practice under Idaho law was when Dr. Lordon testified at trial and Plaintiffs' counsel posed a question to him regarding the DSA. (Tr. Vol. 1, p. 341, LL. 14-23). In response, an objection was made. (Tr. Vol. 1, p. 341, L. 21 - p. 344, L. 14). The court concluded the proposed DSA opinions had not been timely disclosed and sustained the objection. (*Id.*).

The next day, Plaintiffs asked the court to reconsider the issue and allow their expert, James Keller, PA-C, to opine of an alleged breach of the DSA.[3] After lengthy arguments, examination of the circumstances and weighing of the potential prejudice to all parties, the court

[3] Plaintiffs have not presented in their opening brief any argument concerning the District Court's exclusion of Mr. Keller's proposed testimony concerning the DSA or otherwise argued such exclusion was in error. Accordingly, Plaintiffs have waived this issue. *St. v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996); Idaho App. R. 35(a)(6). The analysis provided here is provided for context concerning the District Court's ruling excluding expert testimony concerning the DSA and its application here. Discussion of the District Court's ruling regarding Mr. Keller's purported opinion herein is not intended to act as a waiver or estoppel by Defendants or otherwise be used to suggest that issue is before this Court.

adhered to its prior ruling and excluded the purported opinion of Mr. Keller. (Tr. Vol. 1, p. 395, L. 20 - p. 421, L. 19). Nonetheless, the court advised it would allow Plaintiffs to fully cross-examine the Defendants regarding the DSA, and that Plaintiffs would likely be allowed to offer experts testimony in the rebuttal phase of the case to offer the opinions. (*Id.* at p. 421, LL. 7-19).

Plaintiffs did go on to aggressively cross-examine Mr. Byrne regarding the DSA both in Plaintiffs' case and on cross-examination during Defendants' case. (Tr. Vol. 1, p. 781, L. 10 - p. 800, L. 21; p. 805, L. 8 – p. 812, L. 16; Tr. Vol. 2, p. 1331, L. 8 – p. 1333 L. 2; p. 1341 L. 22 – p. 1352, L. 16; p. 1362, L. 6 – p. 1664, L. 3) Plaintiffs also were allowed to do the same in cross-examination of Dr. Dillé regarding the DSA and the scope of Mr. Byrne's practice. (Tr. Vol. 2, p. 17, L. 17 – p. 1437, L. 23; p. 1441, L. 12 – p. 1446, L. 3). While Plaintiffs' elected to put on rebuttal testimony, they never offered expert testimony regarding the DSA in their rebuttal case. Plaintiffs did argue a breach of the DSA during closing arguments. (Tr. Vol. 2, p. 1924, L. 19 – p. 1930, L. 3; p. 2036, L. 2 – p. 2038, L. 3).

After the jury returned a verdict finding no negligence on the part of the Defendants, Plaintiffs moved for a new trial. After fully considering its rulings and the facts and circumstances supporting its decision, the District Court thoroughly and thoughtfully concluded that a new trial was not warranted. (Tr. Vol. 3, pp. 506-512).

B. Standard of Review.

Upon appeal, this Court reviews a district court's denial of the motion for new trial "for an abuse of discretion and will not disturb that discretion absent a manifest abuse of this discretion." *Johannsen v. Utterbeck*, ___P.3d ___, 2008 WL 4595248 (Idaho 2008) (emphasis

added). Likewise, the exclusion of the proposed expert testimony regarding an alleged breach of the DSA in the Plaintiffs' case for lack of disclosure is subject to review for an "abuse of discretion." *Bramwell v. South Rigby Canal Co.,* 136 Idaho 648, 651, 39 P.3d 588, 591 (2001). This court must uphold the lower court if that court "correctly perceived that the issue was one of discretion"; acted within "outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it"; and "reached its decision by an exercise of reason." *Bramwell,* 136 Idaho at 651, 39 P.3d at 591 (*citing Sun Valley Shopping Ctr Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

C. The District Court Correctly Perceived the Issue as One of Discretion and Applied Appropriate Legal Standards.

In its Memorandum Decision denying a new trial and when it ruled at trial, the court recognized that the issue was one requiring an exercise of its discretion. (R. Vol. 3, pp. 504-512; Tr. Vol. 1, p. 341, L. 14 – p. 344, L. 15; Tr. Vol. 1, p. 396, L. 8 – p. 421, L. 19).

As Plaintiffs did not disclose that their experts would testify that the Defendants breached the DSA, the District Court had the discretion to exclude the testimony. Experts and expert opinion not disclosed pursuant to Idaho Rule of Civil Procedure 26(b)(4) or the court's pretrial scheduling order, are subject to exclusion. *Edmunds v. Kraner,* 142 Idaho 867, 874, 136 P.3d 338, 345 (2006) ("litigants are subject to sanctions, including exclusion of expert testimony, when they have failed to supplement an expert's opinion."); *Clark v. Klein,* 137 Idaho 154, 45 P.3d 810 (2002); *Bramwell,* 136 Idaho at 651, 39 P.3d at 591 (2001).

Rule 26(e) imposes upon a party a continuing obligation of supplementation, including expert opinions, and Idaho Rule of Civil Procedure 26(e)(4) expressly provides that "the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation. . . ." Idaho R. of Civ. P. 26(e)(4). Likewise, Idaho Rule of Civil Procedure 37(e) gives the District Court broad discretion to sanction a party for failure to comply with a court order, such as the scheduling order requiring disclosure of expert opinions. Moreover, Idaho Rule of Civil Procedure 1(a), gives the trial court discretion to make rulings regarding the application of the Idaho Rules of Civil Procedure and the admission of evidence and testimony. Finally, Idaho Rule of Civil Procedure 16(i) allows for the imposition of sanctions for violation of a scheduling order. Based on the lack of disclosure by Plaintiffs, the District Court acted within the bounds of its discretion and consistent with the legal standards applicable to the choices available to it, when it excluded the testimony.

D. The District Court Reached its Decision Through the Exercise of Reason.

A review of the court's analysis and decision-making process regarding the proposed testimony demonstrates that the court reached its decision through the exercise of reason. The District Court identified each of the grounds that the Plaintiffs set forth as a basis for a new trial including, claiming error in law, accident or surprise, and/or irregularities in the proceedings, and in a detailed exercise of reason, decided to not grant a new trial.[4] (R. Vol. 3, pp. 504-512).

[4] The District Court carefully weighed and reached its decision by the exercise of reason to exclude the testimony upon the initial objection when the testimony when originally offered during Dr. Lordon's testimony. (Tr. Vol. 1, p. 341, L. 14- p. 344, L. 15). Further, prior to the testimony of Mr. Keller, the court heard extensive arguments and engaged in explicit and

1. *No Supplementation was Made Even after Plaintiffs Received the DSA.*

Plaintiffs excuse their failure to disclose the opinions of their experts based on the timing of the production of the 2003 DSA. Certainly, the 2003 DSA was discovered and produced later than any party would have liked. However, after examining the underlying circumstances and facts, the District Court concluded that there was "no allegation or evidence that Byrne's delay in producing the document was malicious or in bad faith." (R. Vol. 3, p. 508).

Even after Plaintiffs received the 2003 DSA, they took no steps to supplement their expert disclosures. The Plaintiffs brush aside the lack of disclosure by asserting that they were busy preparing for trial. (Tr. Vol. 1, p. 398, L. 10 – p. 399, L. 8). It was Plaintiffs' October 4, 2007 letter, however, stating that the 2003 IDAPAs required a DSA that led to the discovery of the 2003 DSA. (Tr. Vol. 1, p. 398, L. 10 – p. 399, L.8; Supp. R. Vol. 6, pp. 1098 – 1100; Supp. R. Vol. 5, p. 944). Thus, Plaintiffs demanded production of the DSA, but when they received it, failed to follow up with their experts and supplement their disclosures. Indeed, in the days following Plaintiffs' receipt of the 2003 DSA, Plaintiffs took the opportunity to bring many issues to the District Court, but did nothing to address the DSA.[5]

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detailed fact finding from the parties regarding the circumstances of the late disclosure; weighed competing claims of prejudice; and gave Plaintiffs the opportunity to explore the DSA through other avenues. (Tr. Vol. 1, p. 396, L. 8 – p. 421, L. 19). *See Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 846 P.2d 207 (1993) (exercise of reason found and upheld where the court made extensive inquiry into the circumstances regarding the disclosure at issue, timing of disclosures and potential prejudice).

[5] For example, on October 11, 2007 an all day Motion in Limine hearing was held, but the DSA was not broached: not even the fact that it was an issue. (Tr. Vol. 1, pp. 1-115). Also, on October 15, 2007 the District Court received Plaintiffs' Second Supplemental Trial Memorandum re: Plaintiffs' Expert Jim Keller. (R. Vol. 2, pp. 321-326). That document, signed

2. *The Issue of Scope of Practice Should Have Been Disclosed Months in Advance of Trial.*

The Plaintiffs should have known of the nature of the potential issue regarding Mr. Byrne's scope of authority under Idaho law in the 17 months between Mr. Byrne's deposition and the trial. Plaintiffs had an obligation to research and independently determine the applicable Idaho law, regardless of Defendants' understanding or belief of the law. Plaintiffs' exercise of reasonable diligence should have led them to review the 2003 IDAPAs and determined for themselves the obligations they allegedly imposed upon Defendants, or both of them. Indeed, the District Court concluded the Plaintiffs "had full access to the IDAPA regulations to discover this error. Furthermore, even though the Schmechels had access to both the 2001 job description and the 2004 DSA well in advance of trial, none of the Schmechels' experts opined that Defendants violated Idaho law governing the DSA and/or job description." (R. Vol. 1, p. 509). Thus, the court concluded: "Had expert disclosures been made, albeit regarding the DSA from the wrong year, or the job description, or even regarding the IDAPA regulations, such would have mitigated any surprise or late disclosure problem; however . . . such a disclosure was not made. . . ." (*Id.*). The court continued in its reasoning, noting that the Plaintiffs had "ample time to discover the error" concerning whether a 2003 DSA was required. (*Id.* at p. 510). Thus, the court found that the late disclosure of the 2003 DSA was not the type of

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after the 2003 DSA had been produced, set forth Mr. Keller's qualifications, as well as identified the opinions that he would provide at trial. (*Id.* at 322-323). However, no mention of the DSA or the lawful scope of Mr. Byrne's practice was made. (*Id.*).

"accident or surprise which ordinary prudence should have guarded against that warrants a new trial." (*Id.*).

A review of the evidence, as was undertaken by the court, supports the court's conclusion. The Plaintiffs could have obtained the 2003 IDAPAs at any time, including before Mr. Byrne's deposition. The fact Plaintiffs were utilizing the incorrect version of the IDAPA (i.e. 2004 instead of 2003) was even pointed out to them in 2006. (Supp. R. Vol. 6, p. 1198). However, shortly before trial, Plaintiffs, for the first time, examined the 2003 IDAPAs. (Tr. Vol. 1, p. 398, LL. 10-21). Based on this, Plaintiffs concluded that a 2003 DSA had been required, and wrote Defendants regarding the lack of a 2003 DSA. (*Id.*). Further, on October 4, 2007, before knowing whether there was a 2003 DSA, Plaintiffs sent the IDAPAs, and the 2004 DSA to their experts. (R. Vol. 1, pp. 238-241). Thus, by simply reviewing the 2003 IDAPAs, Plaintiffs concluded that a 2003 DSA was required. They could have argued a violation of the standard of care for not having a DSA, and could have put that issue to the experts months earlier.

Furthermore, in 2006, Plaintiffs were provided the 2004 DSA and the job description that were in place in 2003.[6] (Supp. R. Vol. 6, pp. 1182 - 1183). Even without knowledge of a 2003 DSA, counsel for Plaintiffs could have used the 2004 agreement by simply asking Mr. Byrne or

[6] The relevant language from the 2004 and 2003 DSAs was identical. Both provided: "The physician assistant employed with Southern Idaho Pain & Rehabilitation will be utilized in the initial evaluation for patients seen in this facility. These patients stem from a physician referral base and also patient self-referrals. Patients will require a full history and physical on initial visit. Pertinent findings will be documented and recommendations made. The recommendations will be reviewed by the supervising physician to confirm findings and determine a treatment plan." (Supp. R. Vol. 6, p. 1209; Supp. R. Vol. 5, p. 965).

Dr. Dillé to agree that the scope of Mr. Byrne's authority was not greater in 2003 than it was in 2004, given that in 2004 he would have had more experience and training under Dr. Dillé. This simple question, regardless of whether a 2003 agreement was ever located, or ever existed, would have made the 2004 agreement relevant and could have been utilized by Plaintiffs' and their experts, if disclosed as an opinion. Likewise, the 2001 job description could have been sent to and used by Plaintiffs' experts to claim it was violated.

3. *The Competing Prejudice to the Parties was Appropriately Weighed.*

The District Court appropriately exercised its discretion when it weighed the competing prejudice to the parties regarding the undisclosed opinions. In denying the motion for new trial the court noted, "Had the court permitted such testimony, Defendants would have been presented with undisclosed expert testimony which they argued at trial they were unprepared to rebut. . . ." (R. Vol. 1, p. 510).

Dr. Lordon was deposed twice, with the last deposition occurring in September 2007. He did not have the IDAPAs, the 2004 DSA, or the 2001 job description. He did not offer any opinions of noncompliance with the scope of authority under Idaho law. (Tr. Vol. 1, p. 342, L. 7 – p. 343, L. 1; Supp. R. Vol. 6, pp. 1171 - 1172, at ¶ 6). The same is true of Mr. Keller. In fact, he offered no opinions regarding Dr. Dillé at his deposition. (Tr. p. 414, L. 2 – p. 416, L. 8; Supp. R. Vol. 6, pp. 1171 – 1172, at ¶ 6; Supp. R. Vol. 7, pp. 1327, Depo, p. 118, LL. 3 – 11).[7]

[7] Mr. Keller also testified at deposition, in response to a question by Ms. Duke as to whether Mr. Byrne had the legal authority to alter Mrs. Schmechel's medication; "Sure, that's by any state regulation and supervisory decorum that you have with your supervising physician, a PA has the authority to do that." Ms. Duke then asked; "You are not critical of him [Mr. Byrne]

The trial court also went to great lengths to limit any prejudice to Plaintiffs from having excluded the undisclosed expert testimony. The court provided Plaintiffs free reign to cross-examine Dr. Dillé and Mr. Byrne regarding the IDAPAs and the 2003 DSA, including contentious examination about whether the documents and rules established the standard of care and whether they were breached. Plaintiffs called Mr. Byrne adversely during their case-in-chief and again examined him as well as Dr. Dillé during Defendants' case. Plaintiffs extensively and aggressively cross-examined both Defendants on these issues.[8] (Tr. Vol. 1, p. 781, L. 10 – p. 792, L. 19; p. 805, L. 8 – p. 812, L. 16; Tr. Vol. 2, p. 1331, L. 10 – p. 1333, L. 2; p. 1342, L. 14 – p. 1352, L. 16; p. 1359, L. 21 – p. 1365, L. 1). The extent that the Plaintiffs were allowed to present the issue at trial was highlighted by the court in denying a new trial.[9]

In addition, the court also all but invited Plaintiffs to present expert testimony during rebuttal as to this issue. (Tr. Vol. 1, p. 421, LL. 11 – 19). However, Plaintiffs declined this

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doing that aspect of it?" Mr. Keller answered; "No, absolutely not." (Supp. R. Vol. 7, p. 1311, Depo. p. 55, L. 19 – p. 56. L. 3). Furthermore, Plaintiffs other standard of care expert, Dr. Lipman, testified in his deposition that he had no contention that Dr. Dillé or Mr. Byrne "violated any applicable statute or rule of law in the state of Idaho." (Supp. R. Vol. 6, p. 1131, Depo. p. 137, LL. 3 – 6).

[8] In response to Plaintiffs cross-examinations, Defendants tried to illicit supportive opinions from their experts regarding this issue. However, the court excluded the opinions based on non-disclosure. (Tr. Vol. 2, p. 1480, L. 15 – p. 1490, L. 11). Thus, the court was even-handed in not allowing undisclosed expert testimony concerning the DSA and the scope of practice under Idaho law.

[9] Specifically, the court reasoned: "[T]he court allowed the Schmechels to inquire extensively of both Mr. Byrne and Dr. Dillé regarding the DSA and the alleged failure to comply with the Agreement and abide by Idaho law. While the legal standard in the medical malpractice action requires expert testimony to establish breach of the applicable standard of care, both Dr. Dillé and Byrne were experts in their respective fields and the jury had ample evidence in this regard to review and weigh in determining whether a breach of standard of care occurred." (R. Vol. 3, pp. 510 – 511).

invitation, despite actually presenting a rebuttal case. This was noted by the court in denying a new trial, stating: "Finally, in excluding expert opinion testimony from the Schmechels' case-in-chief, the court indicated it would consider allowing such evidence on rebuttal. However, the Schmechels did not seek to offer such testimony at that juncture. As such, the Schmechels have, in effect, waived the issue." (R. Vol. 3, pp. 511 – 512). *See Bramwell*, 136 Idaho at 652, 39 P.3d at 592 (upholding exclusion of witness due to late disclosure, noting that appellant had failed to call witness in rebuttal despite trial court's invitation).

E. The Exclusion of Undisclosed Testimony Did Not Alter the Outcome of the Trial.

Exclusion of the Plaintiffs' retained expert testimony during the case in chief was, at worst, harmless error and did not affect a substantial right of the Plaintiffs. In the case of an incorrect ruling regarding evidence, a new trial should only be granted if the error "affects a substantial right" of the appellants. *Highland Enterprises Inc., v. Barker*, 133 Idaho 330, 345, 986 P.2d. 996, 1011 (1999). First, it is apparent Dr. Lordon did not actually have an opinion that the Defendants breached the DSA or that Mr. Byrne lacked authority under Idaho law to provide the care he provided. Indeed, he testified Mr. Byrne could lawfully undertake the care that he did and that it was within the scope of his practice.[10] If Dr. Lordon had the opinions that Plaintiffs'

[10] Specifically, at trial, Dr. Lordon testified as follows:

Q: It was certainly okay, in your opinion, for Mr. Byrne to prescribe medications?
A: Absolutely.
Q: That's something Idaho law permits physician assistants to do?
A: Yes.

counsel claimed he did, on redirect, he could have claimed the Defendants had opened the door to the DSA opinions. Plaintiffs elected not to do so; suggesting the witness did not actually hold the excluded opinion. The failure to redirect effectively waived the trial court's alleged error in originally not allowing the undisclosed opinion.

Second, whether the DSA was breached is moot given Dr. Dillé testified in deposition and at trial that, even with the benefit of hindsight, he would not have "made any changes nor done anything differently than what Mr. Byrne had." (Supp. R. Vol. 6, p. 1164). Dr Dillé testified at trial that, if anything, he would have not have been as conservative as Mr. Byrne in his methadone dosing and follow-up of Mrs. Schmechel. (Tr. Vol. 2, p. 1408, L. 2 – p. 1409, L. 1; *id.* p. 1415, L. 20 — p. 1416, L. 13; *id.* p. 1453, L. 15 — p. 1454, L. 2).

Finally, Plaintiffs failed to prove the medical care of Mrs. Schmechel was inappropriate and breached the standard of care. Whether Mr. Byrne had the authority to provide that care without first consulting Dr. Dillé is ultimately irrelevant. Plaintiffs elected to try to prove Mr. Byrne should not have been the one making these determinations without first obtaining

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Q: And Idaho law also allows physicians' assistants to evaluate, plan, and implement plans of care, and you have no problem with that; correct?
A: I have no problem with that.
Q: So you are in no way critical of the fact that Mr. Byrne treated Mrs. Schmechel; correct?
A: No, none whatsoever.

(Tr. Vol. 1, p. 374, L. 4 – p. 375, L. 5). Mr. Keller testified similarly. (Tr. Vol. 1, p. 479, L. 17 – p. 479, L. 1).

Dr. Dillé's approval. But, that did not relieve them of having to prove the decisions themselves were medically inappropriate and a breach of the standard of care.[11]

Plaintiffs' claim regarding Mr. Byrne's scope of authority is analogous to a claim of negligent credentialing.[12] In states where negligent credentialing is recognized, plaintiffs must prove the hospital failed to meet the standard of care in its selection of the physician and granting medical staff privileges, and that, while practicing pursuant to the negligently granted medical staff privileges, the physician breached the applicable standard of care in his medical care and treatment of the patient in question, caused the patient harm. *See e.g., Frigo v. Silver Cross Hosp. and Medi. Center*, 377 Ill. App. 3d 43, 876 N.E.2d 697, 723 (Ill. App. Ct. 2007).[13]

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[11] To prove a breach of the standard of care respecting Mrs. Schmechel's treatment, Plaintiffs had to prove, based on the medical testimony presented at trial: (1) that the decision to replace Mrs. Schmechel's OxyContin with methadone when she was seen by Mr. Byrne and the dosing schedule, amounts and instructions he provided to her, or his follow-up care were medically inappropriate and thus, a breach of the standard of care; and (2) such medical care not only fell below the standard of care, but was the proximate cause of Mrs. Schmechel's death.

[12] Idaho has not recognized a tort of negligent credentialing and the analysis contained here is for illustrative purposes and should not be considered to suggest such a cause of action exists under Idaho law.

[13] The well accepted elements of proof in a negligent credentialing claim in those states that recognize such claims are:

1. The hospital granted privileges to a physician,
2. The physician was unqualified or incompetent,
3. The hospital knew or should have known the physician was unqualified or incompetent,
4. The physician was negligent when treating the patient,
5. The physician's negligence was a substantial factor in producing the harm to the Plaintiffs. (Emphasis added).

See Johnson v. Misericordia Cmty Hosp., 301 N.W. 2d 156, 99 Wis.2d 708, 301 N.W.2d 156 (Wis. 1981).

Leading cases caution it is not enough to prove credentials were negligently given; Plaintiff must also establish the medical care was negligent. *See generally, Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156 (Wisc. 1981); *see also Rule by Rule v. Lutheran Hospitals and Homes Soc. of Am.*, 835 F.2d 1250 (8th Cir. 1987) (requiring the jury to find both that the hospital had been negligent in credentialing the physician and the physician had committed malpractice in his treatment of the mother in labor); *Hiroms v. Scheffey*, 76 S.W.3d 486 (Tex. Ct. App. 2002); (physician determined to be not negligent in medical care provided, there can be no liability for negligent credentialing).

The jury's determination that neither Dr. Dillé nor Mr. Byrne breached the standard of care necessarily included the medical care provided, and makes the issue of the scope of Mr. Byrne's authority to initiate that care irrelevant. Thus, the exclusion of the proposed expert testimony, even if erroneous, was harmless and did not affect a substantial right of the Plaintiffs.

2. The Trial Court Did Not Err By Admitting Dr. Smith's Causation Opinion.

A. Standard of Review.

The District Court has broad discretion regarding the admissibility of expert testimony. The denial of a new trial based upon alleged error in admitting expert testimony will be reversed only on a showing of a manifest abuse of discretion. *Johannsen v. Utterbeck*, ___P.3d ___, 2008 WL 4595248 (Idaho 2008). A trial court does not abuse its discretion if it recognizes the issue as one of discretion; acts within the boundaries of its discretion and applies the legal standards applicable; and comes to its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc., v. Idaho Pwr. Co.* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

B. The Court Recognized the Issue as One of Discretion and Applied the Appropriate Legal Standard.

In analyzing and rejecting Plaintiffs' request for a new trial, the District Court recognized that the issue before it regarding the admission of Dr. Smith's expert opinion was a matter of discretion. (R. Vol. 3, pp. 512 – 517). The court also recognized the issue as one of discretion when it ruled on Defendants' objection at trial. (Tr. Vol. 2, p. 1578, L. 14 – p. 1579 L. 20).

The District Court recognized that Rule 26 (e)(1) provides that a party is "under a duty seasonably to supplement the response with respect to any question directly addressed to...the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony." (R. Vol. 3, p. 514). Likewise, it recognized that if a party does not "seasonably supplement" the responses as required by Rule 26(e), the court may exclude expert opinions not seasonably disclosed or supplemented. (R. Vol. 3, p. 514); *see also* Idaho R. Civ. Pro. 26(e)(4). Thus, a party has a duty to supplement expert opinions. In turn, the trial court has the discretion to admit or exclude revised expert testimony, based upon its exercise of discretion in determining whether the expert opinions were seasonably supplemented. (R. Vol. 3, p. 514). *See Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006).

C. The Court Reached Its Decision Through an Appropriate Exercise of Reason.

1. *It Was Clear Early In the Case That Dr. Smith Would Challenge the Cause of Death.*

Very early it was clear Defendants were contesting that Mrs. Schmechel died from a methadone overdose. On June 18, 2007, Defendants disclosed their expert witnesses and

opinions. (Supp.R. Vol. 1, pp. 172-174). The disclosures indicated Dr. Smith would testify that given Mrs. Schmechel's co-morbid conditions and coronary findings on autopsy, it was not medically possible to conclude that Mrs. Schmechel's death was more likely caused by an overdose rather than another cause of death; specifically a fatal dysrhythmia. (Supp. R. Vol. 1, pp. 172 – 174). In addition, the disclosure indicated that Dr. Smith would be called to "rebut the testimony of Plaintiff's experts to the extent it involves Mrs. Schmechel's cause of death and her life expectancy." (*Id.*). It was also anticipated that. Dr. Smith would be deposed, and that he would testify consistent with his deposition. (*Id.*). In denying a new trial, the court noted that the Plaintiffs were given "early notice" of the "general nature and basis" of Dr. Smith's opinions. (R. vol. 3, p. 516-517).

2. *Dr. Smith's Opinion Was Seasonably Supplemented.*

Throughout the spring and summer of 2007, the parties were undertaking discovery and trying to schedule various depositions of fact witnesses, treating providers and experts. Plaintiffs indicated that they would depose Defense experts, including Dr. Smith. Dr. Smith was to be made available for deposition only after Dr. Groben's deposition, as Dr. Smith needed to have that testimony to complete his opinions. (Supp. R. Vol. 6, pp. 1133 – 1134). Throughout the summer, attempts were made to schedule and depose Dr. Groben and other individuals from the coroner's office who investigated Mrs. Schmechel's death.[14] A few days prior to Dr. Groben's

[14] It was expressly noted in Dr. Smith's disclosure that he would also rely on "the descriptions provided regarding the death scene." (Supp. R. Vol. 1, p. 173). Moreover, Dr. Smith was to be provided "depositions of plaintiffs' 'experts' and plaintiffs' 'treating physicians'" once taken, and that he may rely on any "depositions taken in this case." (*Id.*).

deposition, Plaintiffs cancelled all depositions of Defendants' experts, electing not to proceed with them. (Supp. R. Vol. 6, p. 1145). Dr. Groben was deposed on July 31, 2007.[15]

Ultimately, in addition to Dr. Groben, the deposition of Deputy Coroner Anton, who investigated the death scene, became critical to Dr. Smith and his opinion about the cause of death. (R. Vol. 2, pp. 228 – 237; Tr. Vol. 2, p. 1591, L. 6 – 21). Because of scheduling problems, Ms. Anton could not be deposed until September 5, 2007.[16] Ms. Anton testified in her deposition that she believed that the manner of death was such that Mrs. Schmechel was awake, sitting up on her couch, feet on the floor, a lit cigarette in hand, watching TV at the time she died.[17] (Supp. R. Vol. 6, p. 1161, Depo., p. 41 L. 12 – p. 44, L. 13). Counsel received the deposition transcript of Ms. Anton on September 24, 2007 (Supp. R. Vol. 6, pp. 1103 – 1104). On September 26, 2007, the transcript was hand delivered to Dr. Smith. (*Id.* at p. 1108). After reviewing Ms. Anton's deposition, Dr. Smith met with Defendants' counsel and clarified his opinion.

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[15] The affidavit of Keely Duke filed in support of Defendant's opposition to Plaintiff's motion for new trial sets forth in detail and documents the history of the scheduling of discovery, including the delays and difficulties in completing depositions of key persons, as well as the circumstances leading to the supplemental disclosure of Dr. Smith. (Supp. R. Vol. 6, pp. 1097 – 1167).

[16] Ms. Anton's deposition was originally scheduled for mid-July 2007 based on her availability. However, Plaintiffs' counsel was not available for that deposition during that time frame, requiring rescheduling. (Supp. R. Vol. 6, p. 1155). Ultimately, because of Ms. Anton's schedule and the schedule of Plaintiffs' counsel, Ms. Anton was not deposed until September 5, 2007. (*Id.* at p. 1160).

[17] The way in which a person dies is called the "manner of death," as compared to the "cause of death;" the latter being the medical reason for death. Defendants originally believed that Dr. Groben had determined the manner of death based upon the certification in his autopsy report that stated: "I am of the opinion that the findings, cause and manner of death are as follows: . . ." (Supp. R. Vol. 4, p. 752) (Emphasis added). However, it was discovered that Ms. Anton determined the manner of death, not Dr. Groben. (Tr. Vol. 1, p. 956, LL. 17 — 25; Tr. Vol. 1, p. 723, L. 17 — p. 735, L. 5; Tr. Vol. 1. p. 749, L. 2 — p. 751, L. 2).

Supplementation of Dr. Smith's opinion was produced on October 5, 2007. (R. Vol. 2, pp. 232 – 237). The supplemental expert disclosure, relying on Ms. Anton's testimony that Mrs. Schmechel was awake when she died, rather than asleep and heavily sedated, outlined in detail Dr. Smith's opinion that Mrs. Schmechel likely suffered a sudden cardiac dysrhythmia caused by her underlying cardiovascular disease and other co-morbid conditions. (*Id.*). In essence, Ms. Anton's testimony resulted in Dr. Smith simply strengthening his originally disclosed preliminary opinion that no person could reasonably say that the drug overdose was more likely the cause of death than other potential causes, including cardiac dysrhythmia, to his opinion disclosed on October 5, 2007 that sudden cardiac dysrhythmia was a more likely cause of death than methadone overdose.[18]

Dr. Smith's opinions were supplemented eleven days prior to trial. This was seasonable in light of when Ms. Anton's transcript became available. As the District Court concluded, the timing was due to "scheduling difficulties that inevitably arise in a trial of this magnitude." (R. Vol. 3. p. 516). Upon receipt of the supplementation, Plaintiffs did not seek to add an additional expert, supplement their own expert disclosure, or seek relief of any kind.[19] At trial,

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[18] At trial, Dr. Smith underscored the importance of Ms. Anton's testimony that she presented in her deposition and at trial. When asked whether Ms. Anton's deposition was critical to his opinion, Dr. Smith testified: "It was. I think her deposition as well as the pictures and other information I gained from reading those depositions and looking at the photos were very important...I think – what I learned from that, it appeared as though Mrs. Schmechel suffered a sudden death and that it happened abruptly, and that when you have a sudden death, that all of those – when I say almost all 80% to 90% - are going to be cardiac in origin." (Tr. Vol. 2, p. 1591, L. 6 – 21).

[19] After the disclosure was made, Plaintiffs did not raise the issue regarding Dr. Smith prior to Dr. Smith being called to the stand. This includes the day long Motion in Limine hearing of

the District Court properly concluded that it was within its discretion to allow Dr. Smith to testify and appropriately explained the reasons why it was allowing the testimony. (Tr. Vol. 2, p. 1570, L. 20 – p. 1579, L. 20). Furthermore, in its opinion denying the Plaintiffs' motion for new trial, the court further explained its rationale and reasoning in exercising its discretion to deny the motion for new trial as it related to the admission of Dr. Smith's testimony. (R. Vol. 3, pp. 514 – 519).

The case of *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 846 P.2d. 207 (1993) demonstrates the District Court did not abuse its discretion. In *Hopkins*, the offering party learned of its expert's revised opinion late the night before the witness was to testify, and supplemented the disclosure of the expert's opinion to the opposing party verbally the next morning. The trial court held this was sufficiently "seasonable" under the circumstances and allowed the testimony. The Supreme Court found the trial court did not act outside the boundaries of its discretion and reached its decision by the exercise of reason. Thus, it concluded the district court did not abuse its discretion in refusing to exclude the expert testimony. *Id.* In comparison, the general nature of Dr. Smith's testimony was offered months in advance of trial. Plaintiffs refused to take his deposition. Upon learning new information from a deposition late in proceedings, Dr. Smith's testimony was immediately seasonably supplemented eleven days before trial.

October 11, 2007. During that hearing, Plaintiffs did seek to limit opinion testimony of Dr. Groben regarding causation. (Tr. Vol. 1, p. 18, L. 15 – p. 27, L. 8; p. 34, L. 1 – p. 39, L. 20).

Finally, Plaintiffs argument that they were deprived of an opportunity to obtain an expert to rebut Dr. Smith is not persuasive. Plaintiffs were aware of the nature of the general dispute regarding the cause of Mrs. Schmechel's death well in advance of trial. Plaintiffs had ample expert testimony to support their claim that Mrs. Schmechel died of a methadone overdose.[20] Further, Plaintiffs' suggestion that Dr. Smith, prior to supplementation, did not have an opinion that required rebuttal is untrue. Plaintiffs mischaracterize Dr. Smith's original disclosed opinion as being inadmissible because it was not an opinion of causation on a "more likely than not basis." To the contrary, Dr. Smith always held an opinion on a more likely than not basis that the cause of Mrs. Smith's death was not capable of being proven by Plaintiffs; *i.e.*, one competing potential cause of death could not be proven to be more likely than another. Only when Ms. Anton's deposition transcript became available could, in Dr. Smith's opinion, more weight be given to one potential cause of death over another. Further, the change in Dr. Smith's testimony was based upon the opinion of Ms. Anton given at her deposition. Plaintiffs had full opportunity to challenge Ms. Anton's opinion at her deposition and at trial. All Plaintiffs had to do to challenge Dr. Smith's supplemented opinion was challenge Ms. Anton's opinions.

D. Admitting the Opinion Was Harmless as the Jury did not Reach Causation.

Any error in allowing the testimony of Dr. Smith was harmless as the jury was not required to address the question of causation because it unanimously found that Dr. Dillé and

[20] Dr. Lipman testified extensively in his deposition and at trial that methadone was the likely cause of death. (Supp. R. Vol. 6, pp. 1252 – 1255, Depo., p. 165, L. 11 – p. 174, L. 2; Tr. Vol. 1, p. 634, L. 11 – 636, L. 13; p. 658, L. 5 – p. 660, L. 19). Plaintiffs also called Dr. Groben and elicited expert testimony from him that the cause of death was a methadone overdose. (Tr. Vol. 1, p. 932, L. 14 – p. 965, L. 4).

Mr. Byrne did not breach the standard of care. *See Kalams v. Giacchetto*, 268 Conn. 244, 250, 842 A.2d 1100, 1105 (2004)(a medical malpractice case holding a trial court's ruling concerning the admissibility of expert testimony concerning causation was at worst harmless error because the jury determined there was no breach of the standard of care and never reached the issue of causation). As it relates to issues of the admission of evidence, "a new trial is merited only if the error affects a substantial right of one of the parties." *White v. Mock*, 140 Idaho 882, 892, 104 P.3d 356, 366 (2004). Dr. Smith's testimony was presented solely as it related to issues of causation *i.e.*, the cause of Mrs. Schmechel's death and, had she not died, her reduced life expectancy. (Tr. Vol. 2, p. 1581, L. 12 – p. 1650, L. 17). The jury, on a special verdict form that had separate questions for standard of care and causation, concluded that neither Dr. Dillé nor Mr. Byrne breached the standard of care. Thus it did not even reach the question of causation. (R. Vol. 3, p. 444). The testimony of Dr. Smith therefore had no bearing on the outcome of the verdict and did not affect a substantial right of the Schmechels. *See Gillingham Const., Inc. v. Newby-Wiggins Const., Inc.*, 142 Idaho 15, 23, 121 P.3d 946, 954 (2005).

3. The Court Properly Declined To Formally Admit Into Evidence The IDAPA Regulations Or Instruct The Jury Regarding Negligence Per Se.

A. Standard of Review.

The Plaintiffs' claims the trial court failed to admit the IDAPA Regulations and instruct the jury with their proposed negligence *per se* instruction are both subject to an abuse of

discretion standard.[21] The trial court is vested with wide discretion in making evidentiary rulings, and an evidentiary ruling made in "[e]rror is disregarded unless the ruling is a manifest abuse of the trial court's discretion and affects a substantial right of the party." *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000).

The trial court also has wide discretion in instructing the jury. The Supreme Court's review of the jury instructions "is generally limited to a determination of whether the instructions, when considered as a whole and not individually, fairly and adequately present the issues and state the applicable law." *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 343, 986 P.2d 996, 1009 (1999). When the instructions, taken as a whole, do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error. *Id.* Further, "[i]f the instructions fairly and adequately present the issues and state the law, no reversible error is committed. An erroneous instruction does not constitute reversible error where the instruction taken as whole neither misleads nor prejudices a party." *Id.*

Finally, under Idaho Rule of Evidence 403, a trial court is given considerable discretion to exclude evidence because it would potentially confuse the jury, and absent an abuse of that discretion, will not be overturned. *Perry*, 134 Idaho at 55, 995 P.2d at 825; *Burgess v. Salmon River Canal Co. Ltd.*, 127 Idaho 565, 573, 903 P.2d 730, 738 (1995).

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[21] The abuse of discretion standard regarding evidentiary ruling is discussed in prior sections of this Brief. Whether violation of a statute or regulation constitutes negligence *per se* is a question of law. *Ahles v. Tabor*, 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001).

B. The IDAPA Regulations Cannot Be Used To Establish Negligence *Per Se*, Because They do not Meet the Criteria for Application in This Case.

1. *The IDAPA Regulations Do Not Clearly Define the Standard of Conduct.*

Even if negligence *per se* applied in a medical malpractice case, which Defendants dispute as discussed in further detail below, Plaintiffs cannot establish the necessary elements for application of the doctrine of negligence *per se*. Plaintiffs cite *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 188 P.3d 834 (2008) and *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986) to support their negligence *per se* argument. Both *Sanchez* and *Obendorf* make clear, however, a statue or regulation must meet several elements before it can be used to trigger negligence *per se*. *Cf., Ahles v. Tabor*, 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001). Plaintiffs did not establish the required elements.

A claim of negligence *per se* requires a plaintiff to prove: (1) the statute or regulation clearly defines the standard of conduct; (2) the statute or regulation was intended to prevent the harm caused by defendant's act or omission; (3) plaintiff is a person of the class the statute or regulation was designed to protect; and (4) the violation of the statute or regulation must be a proximate cause of plaintiff's injury. *Ahles*, 136 Idaho at 395, 34 P.3d at 1078; *O'Guin v. Bingham County*, 142 Idaho 49, 52, 122 P.3d 308, 311 (2005). Negligence *per se* is a question of law. *Ahles*, 136 Idaho at 395, 34 P.3d at 1078.

In *Ahles v. Tabor*, the district court held that the defendant was negligent *per se* for violating Idaho Code Section 49-633 when he passed the plaintiff's vehicle on the right side and

caused a collision.[22] *Ahles*, 136 Idaho at 394, 34 P.3d at 1077. On appeal, this Court addressed each of the four required elements and found that element 1 was not met, and thus reversed the lower court, holding "the standard of conduct described in I.C. § 49-633, . . . is far from clear and requires statutory interpretation including consideration of problematic definitions of terms used in the statute." *Ahles*, 136 Idaho at 396, 34 P.3d at 1079.

Ultimately, whether the defendant had violated Idaho Code Section 49-633 and could be found negligent *per se* hinged on whether he was traveling off the "roadway" when he passed the plaintiff on the right and whether the conditions did not "permit[] such movement in safety." *Id.* In determining the statute was ambiguous for purposes of applying negligence *per se*, the Court noted the legislature had defined the terms "highway" and "roadway" in the Idaho Code, but such key terms as "safety" were not defined. The legislature had not provided any guidance to assist in defining or interpreting this term. The Court found: "The distinction that the legislature intended to make in this statute, however, cannot easily be ascertained, contributing to the vagueness of the standard of conduct expressed therein." *Id.*

This Court noted the statute did not provide any guidance concerning the width of pavement that was sufficient for passing on the right and when the passing movement could be

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[22] Idaho Code Section 49-633 reads:
(1) The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
(a) When the vehicle overtaken is making or about to make a left turn;
(b) Upon a highway with unobstructed pavement of sufficient width for two (2) or more lines of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.
(2) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. That movement shall not be made by driving off the roadway. I.C. § 49-633

done in "safety." The Court held that "[a]ll of these questions add to the complexity of the statute and show that the standard of conduct derived from interpreting the statute is less than clear and not easily ascertained or applied." *Id.* Therefore, the statute did not provide a "description of a clear standard of conduct," and "the alleged violation of the statute . . . cannot be deemed negligence *per se*." *Id.*

Plaintiffs cite *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 188 P.3d 834 (2008) as support for their claim that the IDAPAs establish a clear standard of conduct. The Court in *Obendorf* rejected an argument that the applicable statute was ambiguous based on an exception in the statute for using pesticides inconsistent with their label "as provided by rule," because the defendant failed to identify any exculpatory rule allowing off label use of the pesticide. *Obendorf*, 145 Idaho at 899, 188 P.3d at 841. In the absence of an exculpatory rule, the standard provided by the statute was clearly enough to satisfy the first prong of the negligence *per se* analysis. *Id.*

Unlike *Obendorf*, but analogous to *Ahles*, IDAPA Sections 22.01.03 *et seq.* are not sufficiently clear. The IDAPAs fail to define key terms necessary to be applied for negligence *per se* purposes in this case. Specifically, as the trial court recognized, the IDAPAs are "intricate and technical" (R. Vol. 3, p. 525), but "are not in of themselves clear and precise enough to allow me to give a negligence per [sic] instruction on them." (Tr. Vol. 2, p. 1887, LL. 21-24).[23]

[23] Defendants also cite *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1242 (1986) for the proposition that regulations may be used as a foundation for establishing negligence *per se*. *Sanchez* involved specific OSHA regulations that provided mandatory safety measures to be taken when servicing hazardous equipment (e.g. "the engine shall be stopped, the power source

For example, IDAPA § 22.01.03.28 SCOPE OF PRACTICE, indicates various items that a physician assistant may perform, including, "Diagnose and manage minor illnesses or conditions" and "manage the health care of the stable chronically ill patient in accordance with the medical regimen initiated by the supervising physician." IDAPA §§ 22.01.03.28.03 and 22.01.03.28.04. (2003)(Plaintiffs' Trial Ex. 39). Contrary to Plaintiffs' arguments, the regulations do not clearly and adequately define the standard of conduct and thus do not meet the required first prong of the negligence *per se* analysis. For example, the regulations do not define "minor illnesses or condition," "major illnesses or conditions," what constitutes "chronically ill," nor do they define the terms "manage" and "initiate." Further, they do not specify whether these terms are to be considered in light of the type of practice in which the physician assistant in question practices, or other specialized training or experience he may have. As such, what constitutes a "minor" or major illness or condition is ambiguous and left to interpretation, as is what constitutes "managing" care of a "stable chronically ill patient," and what constitutes "initiat[ion]" of a "medical regimen" by a supervising physician.[24]

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disconnected, and all machine movement stopped before servicing or maintenance is performed."). *Sanchez*, 112 Idaho at 616, 733 P.2d at 1241. Such regulations are in clear contrast to the regulations at issue here that are not explicit in nature and do not provide specific guidance regarding personal conduct.

[24] The District Court agreed, noting: "Likewise, there is no evidence that these terms have definite and universally understood meanings within the medical community. The fact that these regulations do not clearly define the applicable standard of care is illustrated by the fact that the Schmechels' own expert testified at trial that Mr. Byrne's treatment of Mrs. Schmechel did not violate Idaho law. Specifically, Dr. Lordon testified as follows:

Q: [By Ms. Duke] Physician assistants evaluate and treat patients, and they do minor medical procedures; correct?

A: That is correct.

Highlighting these terms inherent ambiguity was conflicting trial testimony concerning these terms. Mr. Byrne and others testified that in a pain management practice, Mrs. Schmechel's condition was "minor," and that she was not a "complex" patient, nor was he treating her for a "chronic condition." There was also testimony that the treatment he provided in switching from OxyContin to methadone was a "minor" change and not at all "complex." In addition, there was conflicting testimony as to whether Mr. Byrne "initiated" a treatment regimen, or if it was done, as a dynamic process, which included Dr. Dillé's approval of the general plan the next business day and the plan for Mrs. Schmechel to be seen by Dr. Dillé to confirm and complete the treatment initiation.[25] Therefore, the IDAPA Regulations were not so clear as to be used to establish negligence *per se*.

Q: And that's all appropriate for them to do those things?
A: Yes it is
Q: It was certainly okay, in your opinion, for Mr. Byrne to prescribe medications?
A: Absolutely.
Q: That's something Idaho law permits him to do?
A: Yes.
Q: And Idaho law also allows physician assistants to evaluate, plan, and implement plans of care, and you have no problem with that; correct?
A: I have no problem with that.
Q: So you are in no way critical of the fact that Mr. Byrne treated Mrs. Schmechel; correct?
A: No, none whatsoever.

(Duke Aff. Ex. 5, at 66:13 – 67:25.) Because there could be considerable disagreement regarding what certain key terms mean, the IDAPA regulation does not "clearly define the required standard of conduct." (R. Vol. 3, pp 522—523).

[25] Such testimony included the following: From Mr. Byrne (Tr. Vol. 1, p.787, L. 3 – p. 792, L. 4; Tr. Vol. 2, p. 1248, L. 25 – p. 1252, L. 13; p. 1284, L. 16 – p. 1286, L. 7; p. 1296, L. 11 – p. 1297, L. 19; p. 1324, LL. 2 – 12; p. 1331, L. 10 – p. 1333, L. 2; p. 1342, L. 11 – p. 1343, L. 9; p. 1344, L. 20 – p. 1352, L. 16; p. 1353, L. 1 – p. 1357, L. 20; p. 1359, L. 21 – p. 1361, L. 13; p. 1362, L. 6 – p. 1365, L. 2.). From Dr. Dillé (Tr. Vol. 2, p. 1382, L. 11— p. 1389, L. 9; p. 1389, L. 21 – p. 1391, L. 22; p. 1395, L. 14 – p. 1398, L. 22; p. 1403, L. 23 – p. 1409, L. 1; p. 1411, L.

2. *The Alleged Violation of the IDAPAs was not the Proximate Cause of Death.*

The fourth requirement element of negligence *per se* is that "the violation must have been the proximate cause of the injury." *Ahles,* 136 Idaho at 395, 34 P.3d at 1078. As discussed earlier in this brief, Dr. Dillé testified he would not have treated Mrs. Schmechel any differently than Mr. Byrne did and would not have made any changes nor done anything differently than what Mr. Byrne had. If anything, he might have been less conservative than Mr. Byrne. (*See* analysis in Section 1(E), above).

In addition, as with the claimed error in not admitting undisclosed testimony regarding the DSA, any alleged violation of the IDAPAs was not the proximate cause of Mrs. Schmechel's death. Specifically, even if the IDAPAs were violated, Plaintiffs still had an obligation to prove that the medical care itself fell below the standard of care, regardless of who provided it. Because the jury found there was no violation of the standard of care, it had to have determined the medical treatment itself was appropriate and did not breach the standard of care. As such, an error in instructing regarding the IDAPAs or in excluding them from evidence was harmless in light of the jury's verdict. (*See* analysis in Section 4(1)(E), above).

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3 – p. 1412, L. 13; p. 1429, L. 16 – p. 1430, L. 25; p. 1442, LL. 3 – 18; p. 1451, L. 5 – p. 1453, L. 14). From Mr. Kottenstette (Tr. Vol. 2, p. 1503, L. 1 – p. 1504, L. 14; p.1552, L. 9 – p. 1554, L. 3). From Dr. Smith (Tr. Vol. 2, p. 1638, LL. 7 – 24; p. 1648, L. 11 – p. 1649, L. 4). From Dr. Hare (Tr. Vol. 2, p. 1673, L. 11 – p. 1675, L. 2; p. 1682, L. 7 – p. 1683, L. 1; p. 1683, L. 19 – p. 1684, L. 5; p. 1727, L. 13 – p. 1728, L. 6). From Dr. Binager (Tr. Vol. 2, p. 1811, L. 25 – p. 1816, L. 25; p. 1826, L. 19 – p. 1827, L. 8; p. 1828, L. 15 – p. 1829, L. 15; p. 1832, LL. 5 – 20).

C. Negligence Per Se is Inapplicable in a Medical Malpractice Case.

The court below properly recognized the inapplicability of negligence *per se* in the context of a medical malpractice action.[26] Idaho Code sections 6-1012 and 6-1013[27] require a plaintiff in a medical malpractice case to prove both the standard of care and a breach of that standard of care through direct expert testimony.[28]

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[26] The District Court noted: ". . . [I]t is doubtful that a negligence *per se* instruction should be given in a medical malpractice action brought pursuant to I.C. §§ 6-1012 and 1013. Under I.C. § 6-1012 a medical negligence plaintiff 'must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that [the] defendant . . . negligently failed to meet the applicable standard of health care practice. . .' I.C. § 6-1012." (R. Vol. 3, p. 524).

[27] Idaho Code section 6-1012 provides:

> In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, . . . on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided. . . . (Emphasis added).

Idaho Code section 6-1013, in turn, provides, "The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses. . . ." (Emphasis added).

[28] In this case, Plaintiffs did not offer any direct expert testimony that Mr. Byrne or Dr. Dillè violated the relevant IDAPA provisions. The only experts to address whether the IDAPAs were breached were the Defendants, both of whom testified they met the standard of care. In the absence of admissible direct expert testimony establishing the IDAPA defined the standard of care and a breach of that standard of care, the issue of whether the IDAPAs were breached should not have even been presented to the jury, and could not have supported a finding of liability. *See Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163-164, 45 P.3d 816, 819-20 (2002); *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Because Idaho requires "direct expert testimony" to prove the standard of care and a breach thereof, it would be inconsistent with the specific statutory requirements of Idaho Code sections 6-1012 and 6-1013, to apply a common law theory of liability, negligence *per se*. The very concept of negligence *per se*, by which a standard of care is established without expert testimony and no proof of a violation of the standard is provided through direct expert testimony, is contrary to the express statutory requirements of Idaho's medical malpractice statutes. Indeed, if negligence *per se* were to apply to medical malpractice actions, plaintiffs could put on their case by merely having the jury instructed that the violation of a particular statute or regulation is negligence without the plaintiff ever calling or presenting an expert witness. Cleary, this would violate the more specific mandate of Idaho Code sections 6-1012 and 6-1013.

While Idaho has never squarely addressed this issue, it has rejected other similar common law theories that would ignore the statutory requirement of direct expert testimony. For example, in *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 334, 940 P.2d 1142, 1153 (1997) this Court explicitly held the doctrine of *res ipsa loquitor* does not apply in Idaho to medical malpractice actions given Idaho Code sections 6-1012 and 6-1013's expert testimony requirements. *Kolln*, supports the argument that negligence *per se* also does not apply in a malpractice action in Idaho. Both *res ipsa loquitor* and negligence *per se* are common law negligence doctrines that are supplanted by Idaho Code sections 6-1012 and 6-1013's expert testimony requirements for establishing medical negligence in Idaho.

Other jurisdictions have held the plaintiff in a medical malpractice case cannot use the doctrine of negligence *per se* to circumvent the requirement of establishing the standard of care

and a breach of that standard of care through direct expert testimony. For example, in *Shelton v. Sargent*, 144 S.W.3d 113 (Tex. App. 2004), the plaintiffs claimed the defendants missed a breast cancer diagnosis. The plaintiffs asserted negligence as well as negligence *per se* theories based on the Federal Mammogram Quality Standards Act of 1992 and the Texas Cancer Incidence Reporting Act.[29] On appeal, the Texas Court of Appeals held the plaintiffs could not "circumvent the requirement of expert testimony by merely substituting evidence of violation of a statute," and thus a breach of a statue cannot be used as the basis for a negligence per se claim in a medical malpractice case. *Shelton*, 144 S.W. 3d at 122.

D. It Was Appropriate to Not Send the IDAPAs Back With the Jury.

Idaho courts may take judicial notice of indisputable facts. Idaho R. Evid. 201. They may also take judicial notice of relevant regulations. *See e.g. State v. Howard*, 122 Idaho 209, 213, 832 P.2d 1144, 1148 (Ct. App. 1992). However, courts generally agree it is proper to exclude from evidence items such as copies of statues and rules and regulations, which if admitted, would "invite the jury to substitute its own view of the law" for the court's instructions and because "it would be most confusing to the jury to have legal material introduced as evidence." *U.S. v. Anthony*, 545 F.3d 60, 67 (1st Cir. 2008), *quoting Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 332 fn. 26 (1st Cir. 2004)(per curiam)(Lipez, J.,

[29] Texas does not have the strict statutory requirement that Idaho does for direct expert testimony to prove medical negligence, but rather simply applies the common law rule requiring expert testimony in a medical malpractice case because of the complexity of the issues, unless a plaintiff can establish the presence of negligence through *res ipsa loquitor*. *Shelton* 144 S.W.3d at 122, *citing Pack v. Crossroads, Inc.*, 53 S.W.3d 492, 509 (Tex. App.-Fort Worth 2001), pet. denied). In comparison, Idaho does not even permit *res ipsa loquitor* in a malpractice case. *Kolln,* 130 Idaho at 334, 940 P.2d at 1153.

concurring); *See also Morant v. Long Island, R.R.*, 66 F.3d 518, 522 (2d Cir. 1995)(affirming exclusion of federal railroad regulations from evidence despite allowing testimony relating to the regulations and use of the regulations in closing argument).

Although the district court did not formally admit the IDAPA Regulations into evidence, it allowed Plaintiffs to freely cross examine Mr. Byrne with the IDAPAs and allowed Plaintiffs to display them to the jury and invited Plaintiffs to use the Regulations in their closing argument. (Tr. Vol. 2, pp. 1344, L. 8 – p. 1365, L. 1; p. 1888, L. 4 – p. 1889, L. 13). Plaintiffs, therefore, had ample opportunity to present their theory premised on a violation of the IDAPAs to the jury through effective cross-examination and argument. The court was justifiably concerned, however, that admitting the IDAPA Regulations into evidence and allowing the jury to take them back to the jury room would lead to juror confusion and invited the jury to interpret the law for themselves and ignore the court's instructions.[30] (Tr. Vol. 2, p. 1888, L. 11, – p. 1889, L. 8).

E. The Plaintiffs' Proposed Jury Instruction Inappropriately Commented on the Evidence and was Argumentative.

As a general rule, jury instructions should not comment on the evidence offered at trial and a trial court should not instruct the jury using a proposed instruction that goes beyond defining the law into commenting on the evidence. *Lankford v. Nicholson Mfg. Co.*, 126 Idaho

[30] Regarding the IDAPAs, the District Court stated, "To me, it seems that this is overly burdensome upon the jury to sit back and try to make sense of legal regulations that may or may not apply as they determine the facts of this instance." (Tr. Vol. 2, p. 1888, L. 17 – P. 1889, L. 8). Indeed, an analogy can be made to learned treatises, which may be used by experts, read aloud, displayed to the jury, but are not generally permitted to be admitted formally into evidence and given to the jury to take with them into deliberations, because of the potential for confusing the jury. *See* Idaho R. Evid. 803(18). *See also* Idaho R. Evid. 403.

187, 189-190, 879 P.2d 1120, 1122 - 1123 (1994). In this case, the trial court provided the jury a general negligence instruction concerning the definition of negligence and then instructed the jury of the standard of care as defined by Idaho Code sections 6-1012 and 6-1013. (R. Vol. 3, p. 411 – p. 442).

The Plaintiffs were not satisfied with these instructions and requested a specific instruction concerning the IDAPA Regulations that stated:

> Pursuant to Idaho Code section 54-806(2), the Idaho State Board of Medicine is authorized to promulgate rules to govern activities of persons employed as physician assistants by persons licensed to practice medicine in Idaho. A "supervising physician" is person registered by the Board who is licensed to practice medicine in Idaho, who is responsible for the direction and supervision of the activities of the physician assistant. A "physician assistant" is a person who has been authorized by the Board of Medicine to render patient services under the direction of a supervising physician.
>
> Under the applicable Board of Medicine regulations, the defendant in this case were required to have in place a delegation of services agreement which defined the working relationship between Dr. Dillé and Mr. Byrne. Pursuant to the Board of Medicine regulations, a physician assistant may issue written or oral prescriptions only in accordance with approval and authorization granted by the Board of Medicine and in accordance with the delegation of services agreement and shall be consistent with the regular prescriptive practice of the supervising physician.
>
> Under the Southern Idaho Pain Institute's Delegation of Services Agreement applicable to this case, Mr. Byrne was authorized to conduct an initial evaluation of patients seen in the facility, to do a full history and physical, and thereafter document his findings and recommendations. It was the duty of Dr. Dillé, pursuant to the Board of Medicine regulations and the Delegation of Services agreement [sic], to review the recommendations of Mr. Byrne and to thereafter confirm his findings and to determine a treatment plan.
>
> Failure to follow the duties imposed by the Board of Medicine regulations and/or the Delegation of Services Agreement is a violation of the applicable standard of care.

(R. Vol. 2, pp. 338-39).

The Court declined to use Plaintiffs' proposed instruction and instead provided a general negligence instruction and instructions concerning Idaho Code section 6-1012 and 6-1013. In addition, in Instruction No. 28, it instructed the jury: "You are instructed that the court takes judicial notice of the Idaho Administrative Procedures Act, § 22.01.03 (2003), entitled 'Rules for the Licensure of Physician Assistants.' The rules were in effect in 2003." (R. Vol. 3, p. 426). The court also gave Plaintiffs ample opportunity to align this instruction with the evidence and to put it in perspective by specifically licensing Plaintiffs to freely show the jury the IDAPAs in closing argument and argue their interpretation of these Regulations during their closing argument. (Tr. Vol. 2, p.1888, L. 11 – p. 1889, L. 8). Plaintiffs chose not to do so in their closing argument, but this was their own tactical choice.

F. Any Error Regarding the Admissibility of the IDAPAs was Harmless.

The Plaintiffs suffered no prejudice through the court's refusal to send the IDAPAs back to the jury. When a party is allowed to read a safety code to the jury and question witnesses with the document, the complaining party does not suffer any prejudice. *See Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1229 (5th Cir. 1984) ("No substantial right of Alexander's was affected by the failure to admit the Code as an exhibit because the relevant sections had already been read and shown to the jury."). Given the trial court's liberal grant of permission to Plaintiffs to show the IDAPAs to the jury, to question the Defendants concerning the regulations, and to argue their interpretation of them to the jury, the trial court's refusal to submit the IDAPA Regulations to the jury as evidence was, if error, harmless error.

4. Bifurcating The Issue Of Recklessness Was Appropriate.

A. Standard of Review.

On appeal, this Court's review of jury instructions is limited to a determination of whether the instructions, when considered as a whole and not individually, fairly and adequately present the issues and state the applicable law. *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 343, 986 P.2d 996, 1009 (1999). If the instructions fairly and adequately present the issues and state the law, no reversible error is committed. *Highland Enterprises, Inc.*, 133 Idaho at 343, 986 P.2d at 1009. An erroneous instruction does not constitute reversible error where the instruction taken as whole neither misleads nor prejudices a party. *Id.* The appellant has the burden to clearly show prejudicial error from an erroneous jury instruction. *Garcia v. Windley*, 144 Idaho 539, 543, 164 P.3d 819, 823 (2007).

Furthermore, the trial court has discretion to bifurcate claims and issues and, absent an abuse of that discretion, this Court will not disturb a trial court's ruling concerning bifurcation of issues or claims. *See* Idaho R. of Civ. P. 42(b); *Rueth v. State*, 103 Idaho 74, 80, 644 P.2d 1333, 1339 (1982). Here, the court did not abuse its discretion in deciding to bifurcate the recklessness issue from the other issues initially submitted to the jury and the jury instructions, when read as a whole, fairly and adequately presented the relevant issues to the jury.

B. Recklessness Was Irrelevant Unless and Until the Jury Awarded Damages In Excess of the Statutory Non-economic Damages Cap.

Plaintiffs sought to have the jury determine whether Mr. Byrne was reckless for purposes of piercing the cap on non-economic damages, in the event the jury returned a verdict exceeding the statutory cap. Defendants objected to the Plaintiffs' proposed reckless instruction. (R. Vol. 2,

p. 374 – p. 378). Ultimately, the Court bifurcated the recklessness issue and decided it would only instruct on recklessness if the jury returned a verdict with an award that implicated the statutory non-economic damages cap. In doing so, the court properly weighed the evidence, the potential for prejudice, and the applicable law. (Tr. Vol. 2, p. 1883, L. 11 – 1884, L. 17).

Idaho's tort reform statutes limit non-economic damages in personal injury and wrongful death cases in the absence of "willful or reckless misconduct" to a cap of $250,000 plus or minus an annual statutory adjustment. Idaho Code section 6-1603(4)(a). Under Idaho Code section 6-1603, recklessness is relevant only if a jury awards non-economic damages in excess of the statutory cap. Idaho Code section 6-1603 specifically provides a jury should not be informed of the cap during its deliberations. *See* I.C. § 6-1603(3) ("If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (1) of this section."). The trial court's decision to bifurcate the recklessness issue was consistent with this legislatively recognized policy of not allowing the non-economic damages cap to influence the jury's deliberations.

C. Instructing the Jury had the Potential to Unfairly Prejudice Dr. Dillé.

The issue of reckless conduct was inapplicable to Dr. Dillé. Plaintiffs presented no evidence Dr. Dillé was reckless. In fact, the only Plaintiffs' expert to opine regarding recklessness was Dr. Lipman. However, Dr. Lipman's reckless opinion was confined to Mr. Byrne, and did not address Dr. Dillè. (Tr. Vol. 1, p. 665, L. 19 – p. 670, L. 13.). Plaintiffs' proposed instructions on the issue of recklessness did not differentiate between Dr. Dillé and Mr. Byrne, however. Thus, had the requested instruction been given there was a real risk that the

jury would have been substantially confused. Indeed, it may have led the jury to erroneously consider whether Dr. Dillé was reckless, despite the lack of any supporting competent evidence.

In addition, allowing the jury to consider recklessness before having found negligence created a potential to either confuse the jury, or worse, invite them to "compromise" their verdict by settling on a "negligence" finding; *i.e.*, the potential to "argue recklessness falling back to a negligence position" as a compromise. (Tr. Vol. 2, p. 1883, L. 11 – p. 1884, L. 4). It is the very concern that the jury might improperly confuse a determination of negligence and recklessness that Plaintiffs argue as the reason it was error to not instruct on recklessness. Astonishingly, Plaintiffs assert, "While attorneys and judges easily recognize that negligence constitutes a lesser degree of harmful conduct than recklessness, juries can just as easily perceive them to be two different characterizations of conduct. . . . It is entirely possible in the minds of the Jury, the Respondents were reckless, but they were not negligent." *See* Appellants' Opening Brief, at pp. 35-36. Indeed, it is this very problem, the inappropriate intentional or unknowing jury nullification of the law that the District Court guarded against by bifurcating the recklessness issue.

In comparison, the alleged potential prejudice to the Plaintiffs is very slight. Specifically, Plaintiffs complain that they might have been prejudiced, because they elicited testimony concerning Mr. Byrne's alleged recklessness, but were unable to argue the point to the jury. However, given that the jury heard literally just a few questions concerning recklessness in the course of two and a half weeks of trial, it is unlikely that the lack of an instruction concerning recklessness caused any prejudice to Plaintiffs whatsoever. Indeed, the jury heard far more

testimony about the IDAPAs that Plaintiffs elicited, yet the Plaintiffs consciously elected not to address these regulations in closing arguments.

D. As the Jury Found No Negligence, the Issue of Recklessness was Irrelevant and Not Instructing the Jury was at Worst, Harmless Error.

Plaintiffs cite no authority supporting the proposition a jury can find recklessness without first finding negligence. Indeed, the very suggestion that recklessness could exist in the absence of negligence is contrary to common sense. Because reckless conduct is conduct bearing a higher degree of culpability than negligent conduct, one cannot be reckless without first being negligent. Even Plaintiffs' own proposed instruction begins, "The words "reckless conduct" when used in these instructions and when applied to the allegations in this case, mean more than ordinary negligence. . . ."(R. Vol. 3, p. 343) (Emphasis added). Therefore, if Mr. Byrne was not negligent, he could not be reckless.[31] Many Idaho cases recognize the distinction between "negligence" and "recklessness." *See e.g., Athay v. Stacey*, 142 Idaho 360, 365, 128 P.3d 897, 902 (2005); *Galloway v. Walker,* 140 Idaho 672, 676, 99 P.3d 625, 629 (Ct. App. 2004). Even BLACK'S LAW DICTIONARY recognizes the fact that recklessness embraces a higher standard than negligence and states in its definition of recklessness that, "Recklessness involves a greater

[31] The contention that Mr. Byrne could be liable for recklessness without being found to have negligently breached the standard of care is contrary to Idaho Code sections 6-1012 and 6-1013. These statutes require a plaintiff seeking damages for injuries arising from medical care to prove through direct expert testimony and a preponderance of the evidence that the defendant "negligently failed to meet the applicable standard of health care practice..." (Emphasis added). Therefore, a finding of recklessness without negligence is not only impossible under Idaho law, but it cannot support a damages award in a medical malpractice case.

degree of fault than negligence but a lesser degree of fault than intentional wrongdoing." BLACK'S LAW DICTIONARY, (7th Ed. 1999).

Given that the jury found that neither Defendant negligently breached the standard of care, neither could be found to have been liable. Thus, any error in bifurcating the recklessness issue was harmless and did not affect a substantial right of Plaintiffs. As such, the District Court's decision denying a new trial should be upheld.

V. CONCLUSION.

Based upon the facts, authorities and arguments discussed above, it is clear that the District Court did not abuse its discretion in denying the requested new trial. As such, the decision should be affirmed by this Court, and attorney fees and costs awarded to Respondents.

RESPECTFULLY SUBMITTED, this 18th day of December, 2008

GIVENS PURSLEY, LLP

By: _____
STEVEN J. HIPPLER
J. WILL VARIN
Attorneys for Defendants/Respondents
Clinton Dillé, M.D. and Southern Idaho Pain Institute

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2008, I caused to be served two true and correct copies of the foregoing by hand delivery to all parties' counsel of record in compliance with Idaho Appellant Rule 34(d).

_____
Steven J. Hippler

APPENDIX A

Table of Contents

22.01.03 - Rules For The Licensure Of Physician Assistants

IDAPA 22
TITLE 01
CHAPTER 03

22.01.03 - RULES FOR THE LICENSURE OF PHYSICIAN ASSISTANTS

000. LEGAL AUTHORITY.
Pursuant to Idaho Code Section 54-1806(2), the Idaho State Board of Medicine is authorized to promulgate rules to govern activities of persons licensed under these rules to practice as physician assistants and graduate physician assistants under the supervision of persons licensed to practice medicine and surgery or osteopathic medicine and surgery in Idaho. (3-16-04)

001. TITLE AND SCOPE.

01. Title. These rules shall be cited as IDAPA 22.01.03, "Rules for the Licensure of Physician Assistants". (3-19-99)

02. Scope. Pursuant to Idaho Code, Section 54-1807(2), physician assistants and graduate physician assistants must be licensed with the Board prior to commencement of activities. (3-16-04)

002. WRITTEN INTERPRETATIONS.
Written interpretations of these rules in the form of explanatory comments accompanying the notice of proposed rulemaking that originally proposed the rules and review of comments submitted in the rulemaking process in the adoption of these rules are available for review and copying at cost from the Board of Medicine, 1755 Westgate Drive, Suite 140, P.O. Box 83720, Boise, Idaho 83720-0058. (3-16-04)

003. ADMINISTRATIVE APPEAL.
All contested cases shall be governed by the provisions of IDAPA 04.11.01, "Idaho Rules of Administrative Procedures of the Attorney General" and IDAPA 22.01.07, "Rules of Practice and Procedure of the Board of Medicine". (3-15-02)

004. PUBLIC RECORD ACT COMPLIANCE.
These rules have been promulgated according to the provisions of Title 67, Chapter 52, Idaho Code, and are public records. (3-15-02)

005. INCORPORATION BY REFERENCE.
There are no documents incorporated by reference into this rule. (3-15-02)

006. OFFICE -- OFFICE HOURS -- MAILING ADDRESS AND STREET ADDRESS.
The central office of the Board of Medicine will be in Boise, Idaho. The Board's mailing address, unless otherwise indicated, will be Idaho State Board of Medicine, P.O. Box 83720, Boise, Idaho 83720-0058. The Board's street address is 1755 Westgate Drive, Suite 140, Boise, Idaho 83704. The telephone number of the Board is (208) 327-7000. The Board's facsimile (FAX) number is (208) 327-7005. The Board's office hours for filing documents are 8 a.m. to 5 p.m. (3-16-04)

007. FILING OF DOCUMENTS - NUMBER OF COPIES.
All documents in rule-making or contested case proceedings must be filed with the office of the Board. The original and ten (10) copies of all documents must be filed with the office of the Board. (3-15-02)

008. -- 009. (RESERVED).

010. DEFINITIONS.

01. Alternate Supervising Physician. A physician registered with the Board, as set forth in IDAPA 22.01.04, "Rules of the Board of Medicine for Registration of Supervising and Directing Physicians," under an agreement as defined in these rules, who is responsible for supervising the physician assistant or graduate physician assistant in the temporary absence of the supervising physician. The alternate supervising physician shall accept full medical responsibility for the performance, practice, and activities of such licensee being supervised. An alternate

supervising physician shall not supervise more than three (3) physician assistants or graduate physician assistants contemporaneously. The Board, however, may authorize an alternate supervising physician to supervise a total of six (6) such licensees contemporaneously if necessary to provide adequate medical care and upon prior petition documenting adequate safeguards to protect the public health and safety. (3-16-04)

02. Approved Program. A course of study for the education and training of physician assistants which is accredited by the Committee on Allied Health Education and Accreditation, the Commission on Accreditation of Allied Health Education Programs, the Accreditation Review Commission on Education for Physician Assistants (ARC-PA) or equivalent agency recognized by the Board as recommended by the Committee. (3-16-04)

03. Board. The Idaho State Board of Medicine established pursuant to Section 54-1805, Idaho Code. (3-16-04)

04. Delegation Of Services (DOS) Agreement. A written document mutually agreed upon and signed and dated by the licensed physician assistant or graduate physician assistant and supervising physician that defines the working relationship and delegation of duties between the supervising physician and the licensee as specified by Board rule. *The Board shall review the written delegation of services agreement and may review job descriptions,* policy statements, or other documents that define the responsibilities of the physician assistant or graduate physician assistant in the practice setting, and may require such changes as needed to achieve compliance with these rules, and to safeguard the public. (3-16-04)

05. Graduate Physician Assistant. A person who is a graduate of an approved program for the education and training of physician assistants and who meets all the requirements in this chapter for Idaho licensure, but: (3-16-04)

a. Has not yet taken and passed the certification examination and who has been authorized by the Board, as defined in Subsection 036.01 of these rules, to render patient services under the direction of a supervising physician for a period of six (6) months; or (3-16-04)

b. Has passed the certification examination but who has not yet obtained a college baccalaureate degree and who has been authorized by the Board, as defined in Subsection 036.02 of these rules, to render patient services under the direction of a supervising physician for a period of not more than five (5) years. (3-16-04)

06. Physician. A physician who holds a current active license issued by the Board to practice medicine and surgery or osteopathic medicine and surgery in Idaho and is in good standing with no restrictions upon or actions taken against his license. (3-16-04)

07. Physician Assistant. A person who is a graduate of an approved program and who is qualified by specialized education, training, experience and personal character, as defined in Section 021 of these rules, and who has been licensed by the Board to render patient services under the direction of a supervising physician. (3-16-04)

08. Physician Assistant Trainee. A person who is undergoing training at an approved program as a physician assistant and registered with the Board. (3-16-04)

09. Supervision. The direction and oversight of the activities of and patient services provided by a physician assistant or graduate physician assistant by a supervising physician who accepts full medical responsibility with respect thereto. The constant physical presence of the supervising or alternate supervising physician is not required as long as the supervisor and such licensee are or can be easily in contact with one another by radio, telephone, or other telecommunication device. The scope and nature of the supervision shall be outlined in a delegation of services agreement, as defined in Subsection 030.03 of these rules. (3-16-04)

10. Supervising Physician. A physician registered by the Board, as set forth in IDAPA 22.01.04, "Rules of the Board of Medicine for Registration of Supervising and Directing Physicians," and under an agreement as defined in Subsection 030.03 of these rules, who is responsible for the direction and supervision of the activities of and patient services provided by the physician assistant or graduate physician assistant. The supervising physician accepts full medical responsibility for the activities of and patient services provided by such licensee. A supervising physician shall not supervise more than a total of three (3) physician assistants or graduate physician assistants

contemporaneously. The Board, however, may authorize a supervising physician to supervise a total of six (6) such licensees contemporaneously if necessary to provide adequate medical care and upon prior petition documenting adequate safeguards to protect the public health and safety. (3-16-04)

011. PHYSICIAN ASSISTANT ADVISORY COMMITTEE.
A Physician Assistant Advisory Committee is hereby created and made a part of the Idaho State Board of Medicine, pursuant to adoption of Resolution 01-093. (3-16-04)

01. Committee Appointments. The Board shall appoint the members of the Physician Assistant Advisory Committee. In making appointments to the Committee, the Board shall give consideration to recommendations made by professional organizations of physician assistants and physicians. If recommendations are not made within sixty (60) days of notification and request, the Board may make appointments of any qualified individuals. In the event of a vacancy in one (1) of the positions, professional organizations may recommend, as soon as practical, at least two (2) and not more than three (3) persons to fill that vacancy. The Board shall appoint, as soon as practical, one (1) person, who shall fill the unexpired term. If such professional organizations do not provide a recommendation, the Board shall appoint a person to the unexpired term. The Board may remove any Committee member for misconduct, incompetency, or neglect of duty after giving the member a written statement of the charges and an opportunity to be heard thereon. The Executive Director of the Idaho State Board of Medicine shall serve as the Executive Director to the Physician Assistant Advisory Committee. (3-16-04)

02. Makeup Of Committee. The Committee shall consist of three (3) members appointed by the Board. Each member shall be currently licensed as a physician assistant in Idaho and has been actively practicing as a physician assistant in Idaho for three (3) year immediately preceding appointment. Members will serve a term of three (3) years and terms will be staggered. Members may serve two (2) successive terms. The Committee shall elect a chairman from its membership. The Committee shall meet as often as necessary to fulfill its responsibilities. Members will be compensated according to Section 59-509(h), Idaho Code. (3-16-04)

03. Final Decisions. The Committee shall have no authority to revoke licenses or impose limitations or conditions on licenses issued under this chapter and shall be authorized only to make recommendations to the Board. The Board shall make all final decisions with respect thereto. (3-16-04)

04. Board Affiliation. The Committee will work in the following areas in conjunction with and make recommendations to the Board and will perform such other duties and functions assigned to the Committee by the Board, including: (3-16-04)

a. Evaluating the qualifications of applicants for licensure and registration; (3-16-04)

b. Performing investigations of misconduct and making recommendations regarding discipline; (3-16-04)

c. Maintaining a list of currently licensed physician assistants and graduate physician assistants in this state; and (3-16-04)

d. Advising the Board on rule changes necessary to license and regulate physician assistants and graduate physician assistants in this state. (3-16-04)

012-- 019. (RESERVED).

020. APPLICATION.

01. License Applications. All applications for licensure as physician assistants and graduate physician assistants shall be made to the Board on forms supplied by the Board and include payment of the prescribed fees. (3-16-04)

02. Reapplication. If more than two (2) years have elapsed since a licensed physician assistant or graduate physician assistant has actively engaged in practice, reapplication to the Board as a new applicant is required. The Board may require evidence of an educational update and close supervision to assure safe and qualified

performance. (3-16-04)

03. Application Expiration. An application for licensure that is not granted or license not issued within one (1) year from the date the application is received by the Board shall expire. However, the applicant may make a written request to the Board to consider his application on an individual basis. In its discretion, the Committee may make a determination if extraordinary circumstances exist that justify extending the one (1) year time period up to an additional one (1) year. The Committee can recommend to the Board to grant the request for such extension of time. The Board shall make all final decisions with respect thereto. (3-16-04)

021. REQUIREMENTS FOR LICENSURE.

01. Educational Requirement. Applicants for licensure shall have completed an approved program as defined in Subsection 010.03 and shall provide evidence of having received a college baccalaureate degree from a nationally accredited school with a curriculum approved by the United States Secretary of Education, the Council for Higher Education Accreditation, or both, or from a school accredited by another such agency approved by the Board. (3-16-04)

02. National Certifying Examination. Satisfactory completion and passage of the certifying examination for physician assistants, administered by the National Commission of Certification of Physician Assistants or such other examinations, which may be written, oral or practical, as the Board may require. (3-19-99)

03. Personal Interview. The Board may at its discretion, require the applicant or the supervising physician or both to appear for a personal interview. (3-19-99)

04. Completion Of Form. (3-16-04)

a. If the applicant is to practice in Idaho, he must submit payment of the prescribed fee and a completed form provided by the Board indicating: (3-16-04)

i. The applicant has completed a delegation of services agreement signed by the applicant, supervising physician and alternate supervising physicians; and (3-16-04)

ii. The agreement is on file at each practice location and the address of record of the supervising physician and at the central office of the Board; or (3-16-04)

b. If the applicant is not to practice in Idaho, he must submit payment of the prescribed fee and a completed form provided by the Board indicating the applicant is not practicing in Idaho and prior to practicing in Idaho, the applicant will meet the requirements of Subsections 021.04.a.i. and 021.04.a.ii. (3-16-04)

022. -- 025. (RESERVED).

026. LICENSURE BY ENDORSEMENT.
Reciprocal licensure or licensure by endorsement is not permitted and applicants currently registered or licensed in other states must comply with the requirements set forth in Section 021 in order to be licensed in Idaho. (3-19-99)

027. (RESERVED).

028. SCOPE OF PRACTICE.

01. Scope. The scope of practice of physician assistants and graduate physician assistants shall be defined in the delegation of services and may include a broad range of diagnostic, therapeutic and health promotion and disease prevention services. (3-16-04)

a. The scope of practice shall include only those duties and responsibilities delegated to the licensee by their supervising physician and in accordance with the delegation of services agreement. (3-16-04)

b. The scope of practice may include prescribing, administering, and dispensing of medical devices

and drugs, including the administration of a local anesthetic injected subcutaneously, digital blocks, or the application of topical anesthetics, while working under the supervision of a licensed medical physician. Physician assistants and graduate physician assistants shall not administer or monitor general or regional block anesthesia during diagnostic tests, surgery, or obstetric procedures. (3-16-04)

c. Physician assistants and graduate physician assistants are agents of their supervising physician in the performance of all practice-related activities and patient services. (3-16-04)

d. A supervising physician shall not supervise more than a total of three (3) physician assistants or graduate physician assistants contemporaneously. The Board, however, may authorize a supervising physician to supervise a total of six (6) such licensees contemporaneously if necessary to provide adequate medical care and upon prior petition documenting adequate safeguards to protect the public health and safety. An alternate supervising physician shall not supervise more than three (3) physician assistants or graduate physician assistants contemporaneously. The Board, however, may authorize an alternate supervising physician to supervise a total of six (6) such licensees contemporaneously if necessary to provide adequate medical care and upon prior petition documenting adequate safeguards to protect the public health and safety. (3-16-04)

02. Practice. Initiate appropriate laboratory or diagnostic studies, or both, to screen or evaluate the patient's health status and interpret reported information in accordance with knowledge of the laboratory or diagnostic studies, provided such laboratory or diagnostic studies are related to and consistent with the licensee's scope of practice. The scope of practice shall be limited to patient services under the supervision of the supervising physician: (3-16-04)

a. Within the education, training and experience of the physician assistant or graduate physician assistant; (3-16-04)

b. Consistent with the expertise and regular scope of practice of the supervising physician; and (3-16-04)

c. Rendered within the parameters of the laws, rules, and standards at the locations or facilities in which the physician assistant and graduate physician assistant practices. (3-16-04)

029. CONTINUING EDUCATION REQUIREMENTS.

01. Continuing Competence. A physician assistant or graduate physician assistant may be required by the Board at any time to demonstrate continuing competence in the performance of any practice related activity or patient service. (3-16-04)

02. Requirements For Renewal. Every other year, and prior to renewal of each license as set forth by the expiration date on the face of the certificate, physician assistants and graduate physician assistants will be required to present evidence of having received one hundred (100) hours of continuing medical education over a two-year period. The courses and credits shall be subject to approval of the Board. (3-16-04)

030. PRACTICE STANDARDS.

01. Identification. The physician assistant, graduate physician assistant and physician assistant trainee must at all times when on duty wear a placard or plate so identifying himself. (3-16-04)

02. Advertise. No physician assistant, graduate physician assistant or physician assistant trainee may advertise or represent himself either directly or indirectly, as a physician. (3-16-04)

03. Delegation Of Services Agreement. Each licensed physician assistant and graduate physician assistant shall maintain a current copy of a Delegation of Services (DOS) Agreement between the licensee and each of his supervising physicians. The delegation of services agreement, made upon a form provided by the Board, shall include a listing of the licensee's training, experience and education, and defines the patient services to be delegated. It is the responsibility of the licensee and supervising physician to maintain a current delegation of services agreement. All specialized procedures that need prior review and approval by the Board will be listed on the

delegation of services agreement form supplied by the Board. Prior to provision, all licensees requesting to provide any of the listed services will be required to send their delegation of services agreement to the Board for approval. The Board may require the supervising physician to provide written information, which will include his affidavit attesting to the licensee's qualifications and clinical abilities to perform the specific procedures listed in the delegation of services agreement. This agreement shall be sent to the Board and must be maintained on file at each practice location and at the address of record of the supervising physician. The Committee will review this agreement in conjunction with and make recommendations to the Board. The Board may require such changes as needed to achieve compliance with this chapter and Title 54, Chapter 18, Idaho Code, and to safeguard the public. This agreement shall include: (3-16-04)

a. Documentation of the licensee's education, training, and experience and a listing of the specific patient services which will be performed by the licensee. (3-16-04)

b. The specific locations and facilities in which the licensee will function; and (3-16-04)

c. The written plans and methods to be used to ensure responsible direction and control of the activities and patient services rendered by the licensee which shall provide for: (3-16-04)

i. An on-site visit at least monthly; (3-19-99)

ii. Regularly scheduled conferences between the supervising physician and the licensee; (3-16-04)

iii. Periodic review of a representative sample of records and a periodic review of the patient services being provided by the licensee. This review shall also include an evaluation of adherence to the delegation of services agreement; (3-16-04)

iv. Availability of the supervising physician to the licensee in person or by telephone and procedures for providing backup and supervision in emergency situations; and (3-16-04)

v. Procedures for addressing situations outside the scope of practice of the licensee. (3-16-04)

d. The drug categories or specific legend drugs and controlled drugs, Schedule II through V that will be prescribed provided that the legend drugs and controlled drugs shall be consistent with the regular prescriptive practice of the supervising physician. (3-15-02)

04. On-Site Review. The Board, by and through its designated agents, is authorized to conduct on-site reviews of the activities of physician assistants or graduate physician assistants and the locations and facilities in which the licensees practice at such times as the Board deems necessary. (3-16-04)

031. PARTICIPATION IN DISASTER AND EMERGENCY CARE.
A physician assistant or graduate physician assistant licensed in this state or licensed or authorized to practice in any other state of the United States or currently credentialed to practice by a federal employer who is responding to a need for patient services created by an emergency or a state or local disaster (not to be defined as an emergency situation which occurs in the place of one's employment) may render such patient services that they are able to provide without supervision as it is defined in this chapter, or with such supervision as is available. Any physician who supervises a physician assistant or graduate physician assistant providing patient services in response to such an emergency or state or local disaster shall not be required to meet the requirements set forth in this chapter for a supervising physician. (3-16-04)

032. -- 035. (RESERVED).

036. GRADUATE PHYSICIAN ASSISTANT.

01. Licensure Prior To Certification Examination - Board Consideration. Any person who has graduated from an approved program and meets all Idaho requirements, including achieving a college baccalaureate degree, but has not yet taken and passed the certification examination, may be considered by the Board for licensure as a graduate physician assistant for six (6) months when: (3-16-04)

a. An application for licensure as a graduate physician assistant has been submitted to the Board on forms supplied by the Board and payment of the prescribed fee. (3-16-04)

b. The applicant promptly notifies the Board within ten (10) business days of receipt of the national certification examination results. (3-16-04)

c. After the graduate physician assistant has passed the certification examination, the Board must receive verification of national certification directly from the certifying entity. Once the verification is received by the Board, the graduate physician assistant's license will be converted to a permanent license and he may apply for prescribing authority pursuant to Section 042 of these rules. (3-16-04)

d. The applicant who has failed the certification examination one (1) time, may petition the Board for a one-time extension of his graduate physician assistant license for an additional six (6) months. (3-16-04)

e. If the graduate physician assistant fails to pass the certifying examination on two (2) separate occasions, the graduate physician assistant's license shall automatically be canceled upon receipt of the second failing certification examination score. (3-16-04)

f. The graduate physician assistant applicant shall agree to execute an authorization for the release of information, attached to his application as Exhibit A, authorizing the Board or its designated agents, having information relevant to the application, including but not limited to the status of the certification examination, to release such information, as necessary, to his supervising physician. (3-16-04)

02. Licensure Prior to College Baccalaureate Degree - Board Consideration. Licensure as a graduate physician assistant may also be considered upon application made to the Board on forms supplied by the Board and payment of the prescribed fee when: (3-16-04)

a. All application requirements have been met as set forth in Section 021, except receipt of documentation of a college baccalaureate degree. A college baccalaureate degree from a nationally accredited school with a curriculum approved by the United States Secretary of Education, the Council for Higher Education Accreditation, or both, or from a school accredited by another such agency approved by the Board shall be completed within five (5) years of initial licensure in Idaho; (3-16-04)

b. A personal interview with the applicant or the supervising physician or both may be required and will be conducted by a designated member of the Board; and (3-16-04)

c. A plan shall be submitted with the application and shall be approved by the Board for the completion of the college baccalaureate degree. (3-16-04)

03. No Prescribing Authority. Physician assistants operating under a graduate physician assistant license shall not be entitled to issue any written or oral prescriptions and shall be required to have a weekly record review by their supervising physician. (3-16-04)

037. DISCIPLINARY PROCEEDINGS AND NOTIFICATION OF CHANGE.

01. Discipline. Every person licensed as a physician assistant or graduate physician assistant is subject to discipline pursuant to the procedures and powers established by and set forth in Section 54-1806A, Idaho Code and the Administrative Procedures Act. (3-16-04)

02. Grounds For Discipline. In addition to the grounds for discipline set forth in Section 54-1814, Idaho Code and IDAPA 22.01.01, "Rules of the Board of Medicine for the Licensure to Practice Medicine and Surgery and Osteopathic Medicine and Surgery in Idaho," Section 101, persons licensed under these rules are subject to discipline upon the following grounds if that person: (3-16-04)

a. Held himself out, or permitted another to represent him, to be a licensed physician; (3-16-04)

b. Had in fact performed otherwise than at the discretion and under the supervision of a physician licensed by and registered with the Board; (3-16-04)

c. Performed a task or tasks beyond the scope of activities allowed by Section 028; (3-16-04)

d. Is a habitual or excessive user of intoxicants or drugs; (3-16-04)

e. Demonstrated manifest incapacity to carry out the functions of a physician assistant or graduate physician assistant; (3-16-04)

f. Failed to complete or maintain a current copy of the delegation of services agreement as specified by Section 030; (3-16-04)

g. Failed to notify the Board of a change or addition of a supervising or alternate supervising physician within two (2) weeks of the change as specified by Subsection 037.03; (3-16-04)

h. Aided or abetted a person not licensed in this state who directly or indirectly performs activities requiring a license; (3-16-04)

i. Failed to report to the Board any known act or omission of a licensee, applicant, or any other person, which violates any provision of these rules; or (3-16-04)

j. Interfered with an investigation or disciplinary proceeding by willful misrepresentation of facts or by use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding, investigation or other legal action. (3-16-04)

03. Notification Of Change Or Addition Of Supervising Or Alternate Supervising Physician. A physician assistant or graduate physician assistant must notify the Board within two (2) weeks upon changing supervising physicians or alternate supervising physicians or adding an additional supervising physician. Such notification shall include: (3-16-04)

a. The name, business address and telephone of the new or additional supervising physician or alternate supervising physician(s); (3-16-04)

b. The name, business address, and telephone number of the physician assistant or graduate physician assistant; and (3-16-04)

c. Comply with the requirements of Subsection 030.03. (3-16-04)

d. All supervising physicians and alternate supervising physicians must comply with the requirements of IDAPA 22.01.04, "Rules of the Board of Medicine for Registration of Supervising and Directing Physicians". (3-16-04)

038. -- 040. (RESERVED).

041. PHYSICIAN ASSISTANT TRAINEE.

01. Registration In Training. Any person undergoing training at an approved program as a physician assistant must register with the Board as a trainee, and must comply with the rules as set forth herein. All applications for registration shall be made to the Board on forms supplied by the Board and include payment of the prescribed fee. All registrations shall be dependent upon the length of an approved program and shall be issued for a period of not more than two (2) years. All registrations shall expire on the expiration date printed on the face of the certificate and shall become invalid after that date. All applications for an extension of not more than two (2) years of current registration as a physician assistant trainee shall be made to the Board on forms supplied by the Board and include payment of the prescribed fee. (3-16-04)

02. Approved Program. Notwithstanding any other provision of these rules, a trainee may perform

patient services when such services are rendered within the scope of an approved program. (7-1-93)

03. Registration Fees. The fee for registration as physician assistant trainee shall be no more than fifty dollars ($50). The fee for a one (1) time extension of a current registration as physician assistant trainee shall be no more than fifty dollars ($50). (3-16-04)

042. PRESCRIPTION WRITING.

01. Approval And Authorization Required. A physician assistant may issue written or oral prescriptions for legend drugs and controlled drugs, Schedule II through V only in accordance with approval and authorization granted by the Board and in accordance with the current delegation of services agreement and shall be consistent with the regular prescriptive practice of the supervising physician. (3-15-02)

02. Application. A physician assistant who wishes to apply for prescription writing authority shall submit to the Board an application for such purpose on forms supplied by the Board. In addition to the information contained in the general application for physician assistant approval, the application for prescription writing authority shall include the following information: (3-16-04)

a. Documentation of all pharmacology course content completed, the length and whether a passing grade was achieved (at least thirty (30) hours). (7-1-93)

b. A statement of the frequency with which the supervising physician will review prescriptions written or issued. (3-16-04)

c. A signed affidavit from the supervising physician certifying that, in the opinion of the supervising physician, the physician assistant is qualified to prescribe the drugs for which the physician assistant is seeking approval and authorization. (3-16-04)

d. The physician assistant to be authorized to prescribe Schedule II through V drugs shall be registered with the Federal Drug Enforcement Administration and the Idaho Board of Pharmacy. (3-15-02)

03. Prescription Forms. Prescription forms used by the physician assistant must be printed with the name, address, and telephone number of the physician assistant and of the supervising physician. A physician assistant shall not write prescriptions or complete or issue prescription blanks previously signed by any physician. (3-16-04)

04. Record Keeping. The physician assistant shall maintain accurate records, accounting for all prescriptions issued and medication delivered. (3-16-04)

05. Pharmaceutical Samples. The physician assistant who has prescriptive authority may request, receive, sign for and distribute professional samples of drugs and devices in accordance with his current delegation of services agreement and consistent with the regular prescriptive practice of the supervising physician. (3-16-04)

043. DELIVERY OF MEDICATION.

01. Pre-Dispensed Medication. The physician assistant may legally provide a patient with more than one (1) dose of a medication at sites or at times when a pharmacist is not available. The pre-dispensed medications shall be for an emergency period to be determined on the basis of individual circumstances, but the emergency period will extend only until a prescription can be obtained from a pharmacy. (3-19-99)

02. Consultant Pharmacist. The physician assistant shall have a consultant pharmacist responsible for providing the physician assistant with pre-dispensed medication in accordance with federal and state statutes for packaging, labeling, and storage. (3-19-99)

03. Limitation Of Items. The pre-dispensed medication shall be limited to only those categories of drug identified in the delegation of services agreement, except a physician assistant may provide other necessary emergency medication to the patient as directed by a physician. (3-19-99)

04. Exception From Emergency Period. Physician assistants in agencies, clinics or both, providing family planning, communicable disease and chronic disease services under government contract or grant may provide pre-dispensed medication for these specific services and shall be exempt from the emergency period. Physician assistants in agencies, clinics or both, in remote sites without pharmacies shall be exempt from the emergency period, providing that they must submit an application and obtain formal approval from the Board. (3-16-04)

044. -- 050. (RESERVED).

051. FEES - LICENSE ISSUANCE, RENEWAL, CANCELLATION AND REINSTATEMENT.
All licenses to practice as a physician assistant or graduate physician assistant shall be issued for a period of not more than five (5) years. All licenses shall expire on the expiration date printed on the face of the certificate and shall become invalid after that date unless renewed. The Board shall collect a fee for each renewal year. The failure of any person to renew his license shall not deprive such person of the right to renewal, except as provided for herein and Title 67, Chapter 52, Idaho Code. (3-16-04)

01. Licensure Fee. The fee for initial licensure shall be no more than two hundred twenty dollars ($220) for a physician assistant and graduate physician assistant. (3-16-04)

02. License Renewal Fee. The Board shall collect a fee of no more than one hundred dollars ($100) for each renewal year of a license. (3-16-04)

03. License Cancellation. (3-16-04)

a. Failure to renew a license to practice as a physician assistant and pay the renewal fee shall cause the license to be canceled. However, such license can be renewed up to two (2) years following cancellation by payment of past renewal fees, plus a penalty fee of twenty-five dollars ($25). After two (2) years, an initial application for licensure with payment of the appropriate fee shall be filed with the Board. In addition, the Board may require evidence of an educational update and close supervision to assure safe and qualified performance. (3-16-04)

b. Failure to renew a license to practice as a graduate physician assistant and pay the renewal fee shall cause the license to be canceled. However, such license can be renewed up to six (6) months following cancellation by payment of the past renewal fee, plus a penalty fee of no more than fifty dollars ($50). After six (6) months, an *original application for licensure with payment of the appropriate fee shall be filed with the Board.* (3-16-04)

04. Inactive License. (3-16-04)

a. A person holding a current license issued by the Board to practice as a physician assistant may be issued, upon written application provided by the Board and payment of required fees to the Board, an inactive license on the condition that he will not engage in the provision of patient services as a physician assistant in this state. An initial inactive license fee of no more than one hundred fifty dollars ($150) shall be collected by the Board. (3-16-04)

b. Inactive licenses shall be issued for a period of not more than five (5) years and such licenses shall be renewed upon payment of an inactive license renewal fee of no more than one hundred dollars ($100) for each renewal year. The inactive license certificate shall set forth its date of expiration. (3-16-04)

c. An inactive license may be converted to an active license to practice as a physician assistant upon written application and payment of required conversion fees of no more than one hundred fifty dollars ($150) to the Board. The applicant must account for the time during which an inactive license was held and document continuing competence. The Board may, in its discretion, require a personal interview to evaluate the applicant's qualifications. In addition, the Board may require evidence of an educational update and close supervision to assure safe and qualified performance. (3-16-04)

052. EFFECTIVE DATE.
These rules shall be effective May 5, 1982. Prescriptive privileges and further amendments effective March 24, 1989. Protocols and further amendments shall be effective after March 30, 1992. Amendments providing graduate physician's assistant registration effective April 2, 1993. (7-1-93)

053. DELEGATION OF SERVICES AGREEMENT.
Within one hundred twenty (120) days of the effective date of these rules, all currently licensed physician assistants and graduate physician assistants shall have a written delegation of services agreement as specified in Section 030of these rules. (3-16-04)

054. -- 999. (RESERVED).

Subject Index